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Supreme Court of the United States

OCTOBER TERM, 1951

NO. 393

J. B. WILSON, ET AL, _____ Petitioners,

vs.

WADE KITCHENS, _____ Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEITH & CLEGG,
GAUGHAN, McCLELLAN & GAUGHAN,
J. B. GAUGHAN,
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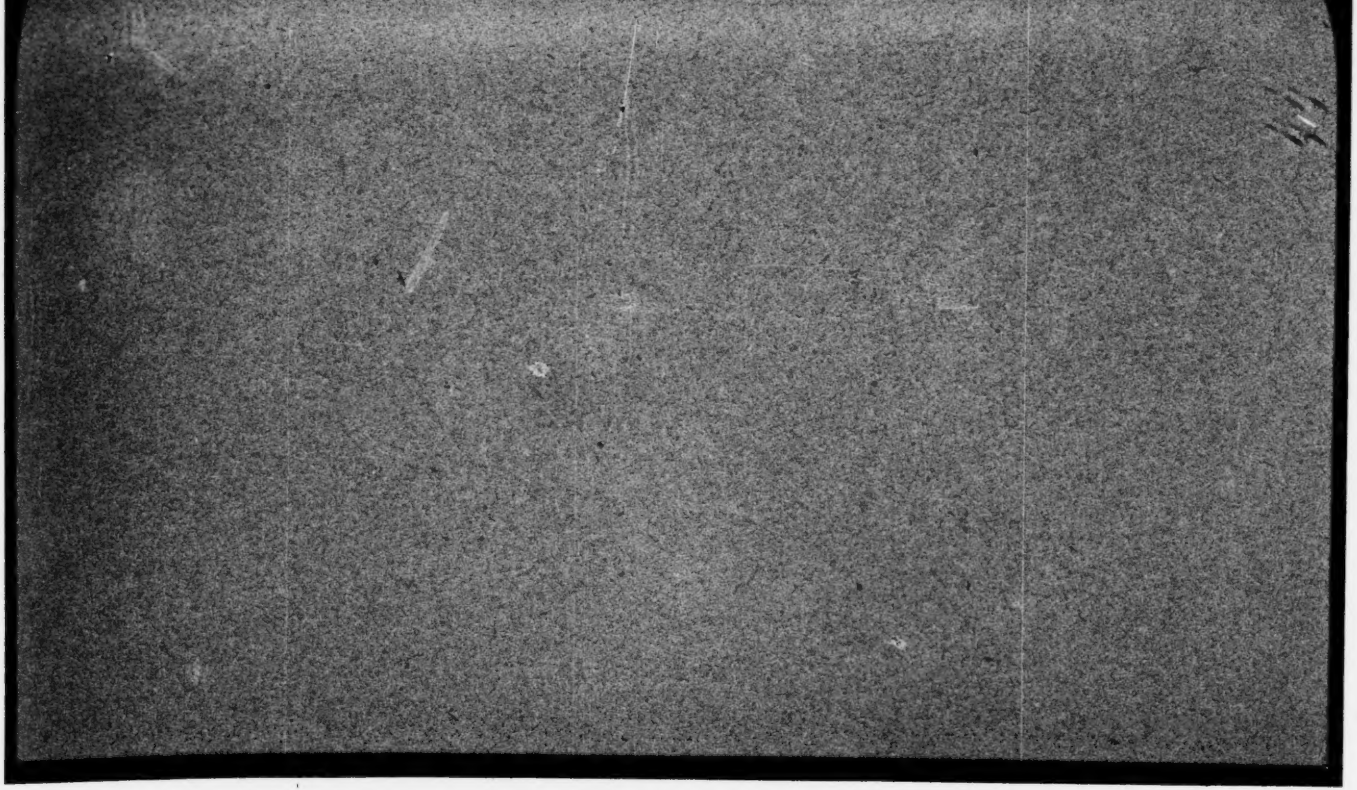

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Supreme Court of the United States

OCTOBER TERM, 1951

MRS. MARY BIRD, MARCUS WILSON, SMEAD WILSON, MRS, MAUD BIRD, MARGARET SAXON, HUDSON WILSON, C. B. WILSON, JR., DEWEY WILSON, JR., and KATHLEEN WILSON WALLER, INDIVIDUALLY AND AS GUARDIAN OF ELLEN LEE WILSON AND CULLEN HOYT WILSON, MINORS ..... Petitioners

VS.

WADE KITCHENS ..... Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States of America.

The petition of Mrs. Mary Bird, Marcus Wilson, Smead Wilson, Mrs. Maud Bird, Margaret Saxon, Hudson Wilson, C. B. Wilson, Jr., Dewey Wilson, Jr., and Kathleen Wilson Waller, Individually and as Guardian of Ellen Lee Wilson and Cullen Hoyt Wilson, minors, respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

On January 13, 1938, suit was filed in the Chancery Court, First Division, in Columbia County, Arkansas, by Respondent, Wade Kitchens, against J. B. Wilson. It was alleged that certain lands and city lots belonging to Wade Kitchens had been sold by the Sheriff of Columbia County under execution to satisfy a judgment recovered by one R. S. Warnock against Wade Kitchens and J. B. Wilson. That J. B. Wilson had arranged to have the lands purchased at the execution sale by one Alvin Rogers. That after the time for redemption expired, Rogers conveyed the lands to J. B. Wilson. That the execution sale was void because Wade Kitchens and J. B. Wilson were partners, and because of fraud perpetrated by Wilson in connection with the sale, and for technical defects in the conduct of the sale. (R. 1-11) In that suit, Kitchens asked for cancellation of the four Sheriff's deeds to Alvin Rogers and for an accounting as to money received by Wilson from the sale of land, timber and oil leases from the lands which Wilson had acquired through the execution sale, and for the appointment of a Master to state an account between Wilson and Kitchens.

J. B. Wilson, the defendant in the aforementioned suit, died in 1946 and the suit was revived

against his surviving heirs and devisees. The case was not tried in the Chancery Court until February, 1948. A decree was entered by the Chancery Court (R. 104-114) holding that Kitchens and Wilson were partners and that the Sheriff's deeds and the deeds from Alvin Rogers to Wilson should be cancelled, and the title quieted in Kitchens as to his land, sold under the execution sale. A Master was appointed to state an account between plaintiff and defendants.

On appeal to the Supreme Court of Arkansas the decree of the Chancery Court, above mentioned, was reversed, and the cause remanded. This was case No. 8839 in the Supreme Court of Arkansas, decided on May 16, 1949, reported as Bird vs. Kitchens in Vol. 215, Page 609, of the Arkansas Reports, 221 SW (2d) 795. (R. 122-128).

The Supreme Court of Arkansas held that Kitchens and Wilson were not partners and that the execution sale was valid, and that Wilson acquired title to the lands described in the Sheriff's deeds.

On 21st day of December, 1938, plaintiff, Kitchens, filed an amendment to his complaint in the Chancery Court (R. 26) alleging that a mortgage or deed of trust executed by Wilson and Kitchens in favor of T. P. Lester had been foreclosed in another proceeding and the lands were sold to Maud Bird, a daughter of J. B. Wilson, that Kitchens

had redeemed the land from Maud Bird and Kitchens prayed that she be required to convey the lands to him. Maud Bird was made a party and filed an answer. (R. 38)

After the case, No. 8839, was remanded to the Chancery Court, the issues pertaining to the redemption from the Lester mortgage were presented and decided by the Chancery Court. That issue arose out of the foreclosure of the mortgage given by Wilson and Kitchens to T. P. Lester, which involved a number of tracts of land that were sold at the execution sale. On February 14, 1933, Wade Kitchens and J. B. Wilson had executed a deed of trust to secure the payment of a note which they jointly owed to one T. P. Lester. This mortgage covered several hundred acres of land owned individually by J. B. Wilson and several hundred acres of land owned by Wade Kitchens, individually, and several hundred acres owned by Kitchen and Wilson as tenants in common (or as partners depending upon the point of view). T. P. Lester and the Trustee in the mortgage, Clyde Fincher, had brought a suit to foreclose the mortgage and on October 26, 1936, judgment was rendered in favor of T. P. Lester, against J. B. Wilson and Wade Kitchens for $6,844.44, with interest thereafter at 10% per annum, and declared to be a lien upon the lands described in the deed of trust and the lien was ordered

foreclosed and the lands sold by a Commissioner named in the decree. (R. 51)

On December 30, 1936, T. P. Lester assigned and transferred the judgment recovered in the foreclosure suit against Wilson and Kitchens to Maud Bird for $7,500.00. (R. 55) Maud Bird is a daughter of J. B. Wilson. On September 11, 1937, the lands contained in the Lester mortgage were sold pursuant to the decree of foreclosure and were purchased at the sale by Maud Bird for the amount of her judgment. A deed was executed to her by the Commissioner on Septembr 16, 1937. (R. 59) The mortgagors, Wade Kitchens and J. B. Wilson, under Arkansas law, had one year from September 11, 1937, the date of the sale, to redeem.

About two months before the time for redemption would have expired Kitchens wrote Maud Bird and stated that he desired to redeem and requested her to advise the amount required. (R. 73) She replied that she would be glad for him to redeem for the amount she paid, $7,500.00, plus interst, taxes and costs. That the amounts could be ascertained at the court house. (R. 73) Kitchens replied urging that he be allowed certain credits and suggested that he would like to redeem only his half of the mortgage. (R. 74) There was no evidence of any agreement that Kitchens might redeem for any

amount less than the amount required under the law.

On September 10, 1938, Wade Kitchens redeemed from the mortgage foreclosure sale by paying to the Clerk of the Court the sum of $8,303.13. (R. 63)

After the Supreme Court had decided, in Bird v. Kitchens, 215 Ark. 609, that the execution sale which occurred on July 24, 1936, was valid, the question arose as to what was the effect of the redemption by Wade Kitchens from the Lester mortgage foreclosure. That issue was tried and presented to the Chancery Court, and a decree was entered on October 3, 1950. (R. 171-177).

It was contended by Wade Kitchens that the redemption amounted to an equitable assignment and that he succeeded to all of the rights of Maud Bird under her deed from the Commissioner. The defendants contended that the redemption satisfied the Lester judgment and cancelled the mortgage and that the title should revert to the mortgagors, but that Kitchens would have the right of contribuion from the Wilson heirs and would be entitled to a lien on the lands to secure that right.

The Chancery Court's decision was in favor of Kitchens and he was declared to be the owner of all of the lands that were in the Lester mortgage. An

appeal was prosecuted to the Supreme Court of Arkansas from that decree and the decision of the Chancery Court was affirmed by the Supreme Court of Arkansas on the 16th day of April, 1951, case No. 9453, reported in Vol. 93, No. 12, Page 513, Advance Sheets, Arkansas Reporter. (R. 185). A petition for rehearing was filed by the Wilson heirs in which it was contended by the petitioners herein, that the decision of the Supreme Court of Arkansas, in effect, deprived these petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 189) The petition for rehearing was denied on 4th day of June, 1951, without opinion.

To summarize, this case presents a state of facts as follows:

A. A mortgage given by two individuals (Kitchens and Wilson) to secure their joint notes.

B. The mortgage covers (1) lands owned by Wilson and Kitchens as tenants in common; (2) lands owned by Wilson individually, and (3) lands owned by Kitchens individually.

C. The lands in the mortgage that were owned by Kitchens had been sold under execution and Kitchens' title to those lands had been acquired by Wilson.

D. The lien of the mortgage was superior to the lien of the judgment under which Kitchens' interest was sold on execution.

E. The mortgage was foreclosed by suit in Chancery Court, brought by the mortgagee, T. P. Lester, against both Wilson and Kitchens, as mortgagors. After judgment in this foreclosure proceeding, but before sale, Maud Bird, a daughter of J. B. Wilson, purchased the judgment and took an assignment of the judgment.

F. The lands were sold on September 11, 1937, to satisfy the mortgage and purchased by Maud Bird for the amount of her judgment, interest, costs, etc.

G. Under Arkansas law, the mortgagors, Wilson and Kitchens, had one year from September 11, 1937, to redeem from the foreclosure sale. Kitchens redeemed on September 10, 1938.

H. Eight months before he redeemed from the foreclosure sale, Kitchens had filed his suit against J. B. Wilson claiming that the execution sale, under which Wilson had acquired title to Kitchens' lands, was void, and that Wilson acquired no title to his land. That suit was pending and was not decided at the time Kitchens redeemed.

I. The subsequent decision by the Supreme Court of Arkansas in Bird v. Kitchens was to the effect that the execution sale was valid and that Kitchens' title sold on execution, passed to Wilson.

J. In the decision of the Supreme Court of Arkansas, on April 16, 1951, in Wilson v. Kitchens, it was held that by redeeming from the mortgage foreclosure sale, Kitchens acquired from Maud Bird the complete title to all of the lands that were sold to her by the Commissioner, including Wilson's individual lands as well as Wilson's undivided interest in lands he had owned as a tenant in common with Kitchens.

The Supreme Court of Arkansas, in its decision, declined to recognize the following legal and equitable principles:

1. That a redemption by one of two or more joint mortgagors is a redemption for the benefit of all, subject, however, to the equitable requirement of contribution by the other mortgagors.

2. The right to redeem within one year is a statutory right. The redemption was effected in the manner prescribed by the statute, one day before the right to redeem expired. Such a redemption by a mortgagor amounts to a satisfaction of the mortgage, and the title remains in the mortgagors free and clear of the mortgage.

3. Regardless of how the redemption was effected, the redemption occurred before the time expired during which Wilson had the right to redeem, therefore, Wilson had a right to redeem from Kitchens which was not related to the statutory right of one year, and this right was not limited as to time, because the statutory right had already been exercised and a new right in favor of Wilson came into existence, which he has been denied the privilege of exercising.

4. The doctrine of equitable assignment does not apply when the redemption is by a mortgagor, nor does it apply when there is in existence a right of redemption resting in another party.

5. If Kitchens claimed that his redemption amounted to an equitabl assignment to him, he should be required to recognize the right of Wilson to redeem from him in order to protect his own interest in these lands.

The failure of the Court to recognize and apply these principles amounts to a taking of petitioners' property without due process of law.

POINTS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The effect of the Court's decision is to transfer from Maud Bird to Wade Kitchens, title to lands owned by petitioners. Under the circumstances in this case, this transfer of title by order and decree of the Court is in violation of the due process clause of the Federal Constitution.

2. The redemption by Wade Kitchens from the mortgage foreclosure was accomplished pursuant to a statutory right and within the statutory period fixed by law. The effect of such a redemption does not operate to transfer title to the redemptioner, and the decree of the Court giving such effect to the redemption amounted to a taking of Petitioner's property without due process of law.

3. The Court in effect held that the agreement on the part of Maud Bird to permit Kitchens to redeem, constituted a contract to convey the land redeemed from the mortgage sale. This amounted to the Court setting up a contract between parties where no such contract existed; and the Court itself, having created the contract, then proceeds

to enforce the contract. The enforcement by the Court of a non existing contract, where the title to property is divested out of one person and vested in another, is a taking of property without due process of law.

4. The redemption by Kitchens was effected during the time when either Kitchens or Wilson could have redeemed. The redemption by one of several persons having a right to redeem starts a new period of redemption in favor of other parties having the right to redeem. Petitioners, by this decree, have been deprived of all opportunity to redeem under the right of redemption opened up by Kitchens' redemption from Maud Bird. The denial of this right to petitioners is in violation of the due process clause of the Constitution.

5. In holding that the redemption by Kitchens resulted in the transfer of title in the lands from Maud Bird to Kitchens, the Supreme Court of Arkansas cited and relied upon decisions of other courts which are clearly distinguishable from this case, and the Supreme Court of Arkansas failed to follow and apply well recognized and established legal precedents — such procedure, where property is taken, is without due process of law.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and

under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9453, Series 4, J. B. Wilson, et al Appellants vs. Wade Kitchens, Appellee, and that the said judgment of the Supreme Court of Arkansas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

KEITH & CLEGG,
GAUGHAN, McCLELLAN & GAUGHAN,

J. E. GAUGHAN,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1951

NO.

MRS. MARY BIRD, MARCUS WILSON, SMEAD WILSON, MRS. MAUD BIRD, MARGARET SAXON, HUDSON WILSON, C. B. WILSON, JR., DEWEY WILSON, JR. AND KATHLEEN WILSON WALLER, INDIVIDUALLY AND AS GUARDIAN OF ELLEN LEE WILSON AND CULLEN HOYT WILSON, MINORS ..... Petitioners,

VS.

WADE KITCHENS ..... Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

Petitioners seek to review the decision of the Supreme Court of Arkansas which affirmed the decision of the Chancery Court for Columbia County, Arkansas. The State Supreme Court's opinion, dated April 16, 1951, case No. 9453, is reported

in the advance sheets of the Law Reporter, Vol. 93, No. 12. (R. 185)

Petition for Rehearing was denied without opinion on June 4, 1951. (R. 205)

II.

JURISDICTION

1.

The authority of this Court to review this case is predicated upon Title 28 USCA, Section 1257(3).

2.

The federal question arises out of the fact that petitioners have been deprived of their property and property rights without due process of law in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

3.

The manner in which petitioners' rights have been denied them in violation of the Constitutional Amendment is set forth in the "points relied upon" in the petition for certiorari.

4.

The Constitutional question was raised in paragraph VI of the Petition for Rehearing in the Supreme Court (R. 191), as follows:

"The decision of the Court holding that the redemption amounted to an equitable assignment amounts to a taking of appellants property, without due process of law in violation of Amendment XIV to the Constitution of the United States. We here and now urge consideration of this constitutional question which arises as a result of the affirmance of the lower Court's decision."

5.

The question raised here is unusual, novel and unique. One of two mortgagors, who had lost his equity of redemption, was neverthless permitted to redeem from the mortgage foreclosure sale. According to the decision of the State Court, because he was permitted to redeem after he had lost his equity of redemption, his reward was greater than it would have been if he had not lost his equity of redemption. If he had merely exercised his legal right of redemption he would have accomplished no more than to have cleared his own lands and the lands of his co-mortgagor of the mortgage; but because he was permitted to exercise the same right to redeem, that had been lost to him, he reacquires not only his own lands, but acquired the lands of his co-mortgagor and co-tenant as well.

6.

Under the State Statutes relating to redemption from mortgage sales and State decisions, the

redemption restores the land to the mortgagor, free of the sale and the lien of the mortgage.

III.

STATE STATUTES PERTAINING TO REDEMPTION AND STATE DECISIONS AND AUTHORITIES

The right to redeem from mortgage foreclosure sales under order of a court is provided for in Section 51-1111, Arkansas Statutes, 1947. There is another Statute, Section 51-1112, which relates only to redemption from sales under the power in a mortgage.

Section 51-1111 provides:

> "51-1111. Redemption of real property. — In all cases where real property is sold under an order or decree of the chancery court, or a court exercising chancery jurisdiction in the foreclosure of mortgages and deeds of trust, the mortgagor, his heirs or legal representatives, shall have the right to redeem the property so sold, at any time within one year from date of sale, by the payment of the amount for which the property was sold, together with interest thereon, at the rate borne by the decree or judgment, and the cost of foreclosure and sale; provided, that the mortgagor may waive such right of redemption in the mortgage or deed of trust so executed and foreclosed; provided, that this act (sec-

tion) does not apply to any contracts, mortgages, or deeds of trust now in existence, or to any suits now pending."

The leading authority on Arkansas mortgages is Hughes work entitled "Arkansas Mortgages". Mr. Hughes discusses the effect of redemption in Sections 506 and 507, beginning on page 405. These Sections read as follows:

"Sec. 506. Effect of Redemption — Sale Under Power. — The tender or payment by the mortgagor of the proper amount in time not only defeats the title of the purchaser, but it has another important effect. It destroys the mortgage. If the land be sold under the power for less than the mortgage debt and the mortgagor redeems, the mortgagee cannot afterward sell the same land again for the deficiency. That land is forever free of the mortgage. The redemption restores the land to the mortgagor free of the sale and the lien of the mortgage.

"Sec. 507. — Same — Sale Under Decree. — The effect of redemption from sale under a decree of foreclosure in a chancery court is the same. We have seen that the right of redemption as to such sales exist unless waived. Where it is not waived and the mortgagor redeems from the sale under the Act of 1899, the mortgage as to that land is as if it had never been. All proceedings in the chancery cause, including the sale, are rendered of no effect and the mortgage is no longer a lien on the land."

Cases dealing with this subject are:

Handford v. Edwards, 89 Ark. 151
Fields v. Danehower, 65 Ark. 392
Baker v. Boyd, 196 Ark. 563

The above case quotes from 3 Pomeroy Equity Jurisprudence Section 1220.

Norris v. Scroggins, 175 Ark. 50
Layton v. Thayne, 144 Fed. 2d 94

Since the right to redeem, according to the State Court's decision stems from the agreement between Maud Bird and Wade Kitchens, the three letters that passed between them should be considered. (R. 73-74)

The law seems to be that an agreement to permit a redemption before the statutory period of redemption expires is nothing more than a recognition of the Statutory right. Such agreements may be oral, without violating the Statute of Frauds. A different rule obtains where the agreement to permit redemption comes after the Statutory period of redemption has expired. Such agreements are in effect agreements to reconvey, and must be in writing. For discussion of this subject see

Hughes Arkansas Mortgages, Section 509
Littell v. Jones, 56 Ark. 139
Williams v. Dumas, 197 Ark. 1011
Coates v. Dortch, 145 Ark. 82

Jackson v. First National Bank of El Dorado, 195 Ark. 648
Schlumpy v. Shofner, 210 Ark. 452
American Mortgage Company v. Williams, 103 Ark. 484.

IV.

HAS THE FEDERAL QUESTION BEEN PROPERLY AND TIMELY RAISED

After the Supreme Court had held that the execution sale was valid in Bird v. Kitchens, and the case had been remanded for the accounting between the Wilson heirs and Kitchens, it was necessary to determine what were the relative rights of the parties arising out of the redemption by Kitchens from the sale in the Lester mortgage foreclosure. That issue could have been decided without a federal question being involved, but when the Supreme Court came out with the opinion holding that the redemption had the effect of divesting the petitioners of every right they had in these lands, and holding that respondent acquired title to these lands through the redemption, it appeared that this amounted to a taking of petitioners property, without due process of law. On rehearing this Constitutional question was raised in the petition for rehearing but without avail.

This Court has the right to determine whether the taking of petitioners property in this manner presents a federal question.

Citations:

Lovell v. Griffin, 82 L. Ed. 949-303 U. S. 444

First National Bank of Guthrie Center v. Anderson, 70 L. Ed. 295, 269 U. S. 341

Schuylkill Trust Co. v. Pennsylvania, 80 L. Ed. 91, 296 U. S. 113

It has been held that a Constitutional question may be raised for the first time in a petition for rehearing.

Citations:

Brickerhoff-Faris Trust & Savings Co. v. Hill, 74 L. Ed. 1107, 281 U. S. 673

Radio Station WOW, Inc. v. Johnson, 89 L. Ed. 2092, 326 U. S. 120

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American Surety Co. v. Baldwin, 77 L. Ed. 231, 287 U. S. 156

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382.

If, as Mr. Hughes says, it has always been the rule of law in Arkansas under our redemption Statute, that when a mortgagor redeems even from a sale under an order of Court, "it destroys the mortgage", the decision of the Supreme Court in the case is contrary to the rule that was in effect when this redemption occurred. The petitioners had the right to assume that the Supreme Court would apply the established rule until the contrary purpose was revealed in the Court's decision. Under the circumstances, the federal question raised in the petition for rehearing has raised in time.

Tidal Oil Company v. Flanagan, 263 U. S. 644, 68 L. Ed. 382, supra.

CONCLUSION

The petitioners respectfully submit that the petition for writ of certiorari should be granted.

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RESPONSE OF WADE KITCHENS TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

W. H. KITCHENS, JR.,
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1951

No. 393

MRS. MARY BIRD, MARCUS WILSON, SMEAD WILSON, MRS. MAUD BIRD, MARGARET SAXON, HUDSON WILSON, C. B. WILSON, JR., DEWEY WILSON, JR., and KATHLEEN WILSON WALLER, Individually and as Guardian of ELLEN LEE WILSON and CULLEN HOYT WILSON, Minors, ... Petitioners

vs.

WADE KITCHENS, ... Respondent

RESPONSE OF WADE KITCHENS TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS OUT OF WHICH THIS CONTROVERSY AROSE AND ISSUES DETERMINED IN THE SUPREME COURT OF ARKANSAS.

Respondent, Wade Kitchens, and J. B. Wilson, ancestor of petitioners, in 1933 were sued upon their joint note due the late R. S. Warnock and judgment was entered against them on February 14, 1933. J. B. Wilson, just prior to the execution sale on July 24, 1936, compromised and settled that judgment for $9,500.00 and in so doing obtained a very substantial discount. J. B. Wilson apparently took charge of the sale under the execution, completely dominated it, had a dummy, one Alvin Rogers, to

bid in the property and later had the dummy to quitclaim the lands to himself. Mr. Wilson, through his dummy bid $500.00 for the lands involved herein and $4,250.00 for all of the other properties of the respondent, Wade Kitchens. This was during the depression.

On January 13, 1938, respondent, Wade Kitchens, instituted suit in the Chancery Court of Columbia County, Arkansas, to set aside the execution sale on numerous grounds ordinarily sufficient to void sale under execution, among which Kitchens asserted that he and Wilson were partners, sustained a fiduciary relationship, and were not dealing at arm's length.

Petitioners herein, succeeding to the rights of J. B. Wilson after his death in 1946, vigorously and successfully opposed the contentions of Wade Kitchens and the Supreme Court of Arkansas agreed with and sustained in the main the position taken by appellants in that action, petitioners here.

The respondent herein, Wade Kitchens, then sought a writ of certiorari from this Honorable Court, as appears in cause No. 390, October Term, 1949, and this court denied and refused to issue the writ of certiorari sought by the respondent here, Wade Kitchens.

The respondents (petitioners herein) in that proceeding before this court contended that a constitutional question raised for the first time after a decision of the State Supreme Court, came too late. Petitioner therein, respondent herein, urged among other things, lack of due process, a right to redeem under the facts and circumstances in that case and a right to the equal protection of the law. Now, petitioners here (respondents therein) seek a writ when no constitutional question was ever raised until the petition for a rehearing was filed by the petitioners here (appellants there) in the Supreme Court of Arkansas.

The lien of said judgment recovered by the late R. S.

Warnock against Wilson and Kitchens had expired at the end of three years. J. B. Wilson and respondent, Wade Kitchens, prior to the entry of the judgment in favor of the late R. S. Warnock against them, executed a note and mortgage for $5,000.00 to one T. P. Lester. Suit to foreclose was instituted by T. P. Lester on June 16, 1936, and a decree was rendered in that action on December 16, 1936, against J. B. Wilson and Wade Kitchens. The execution sale or the lien incident thereto was inferior to the lien held by T. P. Lester under the note and mortgage on which he had instituted foreclosure proceedings.

Mrs. Maud Bird, daughter of J. B. Wilson, purchased the Lester decree for $7,000.00 on December 30, 1936. Her purchase was evidenced by an assignment in legal form and the decree was duly assigned to her by a marginal entry on the record of said decree. J. B. Wilson had acquired at the execution sale on July 24, 1936, through his dummy, Alvin Rogers, all of these properties and all of the other Wade Kitchens properties (rural lands, town and city property, one time valuable rental properties) by quitclaim deed. J. B. Wilson did not attempt to complete or perfect title in him by reimbursing Mrs. Maud Bird for her expenditure in the purchase of the Lester decree fixing a lien on the lands now involved. Mrs. Maud Bird's lien was superior to the lien acquired by J. B. Wilson. Her lien growing out of the Lester debt was J. B. Wilson's debt to the extent of the value of the properties described in the mortgage. Respondent, Wade Kitchens, as it turned out had no interest in the properties as shown by the decision of the Supreme Court of Arkansas in this case, that is, as to any of the properties advertised and sold under the execution or the later foreclosure sale.

J. B. Wilson had acquired Wade Kitchens' right of redemption but it had not been judicially determined at the time of the redemption what the respective rights were.

On September 11, 1937, Mrs. Maud Bird had not been

paid the amount due her on her decree by J. B. Wilson, or anyone else for him. She then had the property sold under the Chancery decree of which she was the then owner. At said foreclosure sale she purchased all the land herein involved for $7,500.00. That purchase satisfied the decree and the judgment and lien fixed by the decree. The sale to Mrs. Maud Bird was duly approved and confirmed after it had been reported to the court and a deed was executed to her by the Commissioner in Chancery. The deed was also approved and confirmed by the court. J. B. Wilson, the sole owner of the properties sold at the foreclosure sale and with the sole right of redemption under the statutes of Arkansas as determined by the Supreme Court of Arkansas (R. 185-188), failed to redeem. His time for redemption expired on September 11, 1938.

To protect his rights and his cause of action as he thought, in his suit instituted on January 13, 1938, respondent, Wade Kitchens, on July 26, 1938, wrote Mrs. Maud Bird a letter advising her that he had consulted her father regarding a redemption from her of the lands sold at the foreclosure sale, and that her father, J. B. Wilson, had stated that he would have nothing to do with it. Mrs. Maud Bird answered that letter and in it she was critical of respondent for having talked to her father about it, explaining that the transaction was wholly hers and her father knew and had nothing to do about it or with it. Her letter (R. 73-74) is as follows:

> "In receipt of your letter of July 26, 1938, with reference to the redemption of lands sold in the Lester Mortgage foreclosure, and which I bought at such sale. I do not know what you mean by speaking to my father about this matter. This was my purchase and my transaction through out and my father knew nothing about it.
>
> "I shall be glad to have your redeem this property. I payed as a purchase price $7,500.00 and there will

be the interest thereon from September 11, 1937 until the date of your redemption. I do not know what the costs are, but we can easily ascertain said amount by going to the courthouse. I will have the amount of taxes ready anytime you advise me that you are ready to redeem this land for the above sum of $7,500.00 plus the interest, taxes and cost."

Following the suggestion in that letter, your respondent, Wade Kitchens, deposited $8,303.13 with the Clerk of the Chancery Court of Columbia County, Arkansas, the amount demanded by Mrs. Maud Bird. That deposit was made on September 10, 1938, one day before the year expired for J. B. Wilson to redeem. After that money was deposited with the Clerk at the Columbia Chancery Court, Mrs. Maud Bird waited until December 23, 1938, before taking down the money. (R. 64).

When Mrs. Maud Bird took down the money, after the year for redemption by J. B. Wilson had expired, there was consummated and completed in equity an equitable assignment of all of the real estate acquired by Mrs. Maud Bird under the deed from the Commissioner of the Court vesting in her title to all the lands described and set out in the Lester mortgage, said lands being situated in Columbia County, Arkansas. Mrs. Maud Bird had no further interest in this real estate. Her father, J. B. Wilson, had no further interest in said real estate and petitioners herein as descendants and legatees of J. B. Wilson who died in 1946 at no time after she received the money had any interest in the lands, the real estate described in the Lester mortgage and described in the Lester decree of foreclosure and described in the deed by which Mrs. Maud Bird became the owner of said property.

The learned Chancellor of the Columbia County Chancery Court under the facts developed in the oral testimony and under the documentary evidence introduced found as a matter of fact and as a matter of law that it was an equit-

able assignment of all the real estate included in the Lester mortgage, the Lester decree of foreclosure and the deed executed to the purchaser, Mrs. Maud Bird, and later approved and confirmed by the court after the sale had been reported, approved and confirmed and that the title to the real estate involved vested in Wade Kitchens, the respondent, because it no longer belonged to Mrs. Maud Bird nor to J. B. Wilson nor to the heirs and legatees of J. B. Wilson; that your respondent, Wade Kitchens, had paid a valuable consideration, the exact amount which Mrs. Maud Bird demanded and which she voluntarily took down 104 days after it was deposited with the Clerk of the court pursuant to her direction and long after the time for redemption by J. B. Wilson had expired.

The Supreme Court of Arkansas, the same court which had decided the other branch of the case, by unanimous decision after thorough and careful consideration over a considerable period of time, affirmed the findings and the decree of the learned Chancellor and fortified its decision by a citation of the general law in such cases made and provided and by numerous decisions from the courts of last resort in various states.

The Supreme Court of Arkansas, at the urgent request of petitioners had previously found that J. B. Wilson and your respondent, Wade Kitchens, were not partners, sustained no fiduciary relationship to each other and at the time of the execution sale and thereafter, were dealing at arm's length. Yet, petitioners now claim the learned Chancellor and the Supreme Court of Arkansas deprived them of their property without due process of law. They ask this court to set aside the finding of fact by the Supreme Court of Arkansas that respondent and J. B. Wilson were not partners, did not sustain any fiduciary relationship, and were dealing at arm's length, and they now ask this court to amend our redemption statute so that they may have unlimited time within which to redeem this property,

although their ancestor, J. B. Wilson, refused to redeem. J. B. Wilson refused to redeem because he said he no longer wanted these old lands. If he paid anything at all for them it was only $500.00, and he had sold timber from his lands in the Lester mortgage prior to the foreclosure suit for $3,500.00 and therefore profited at least $3,000.00 without having to pay anything to Mrs. Maud Bird. He elected to keep what he had, the other valuable properties of respondent almost at the very worst of the depression, obtained at the execution sale, and pay his daughter, Mrs. Maud Bird, nothing.

Now, petitioners under all the changed circumstances, increased value of the lands, timber, and depreciation of the dollar to about fifty cents, desire to redeem, if possible, or establish a fiduciary relationship in some way of J. B. Wilson and respondent. In truth, at no time did they ever offer to redeem or contribute one penny to your respondent, Wade Kitchens, in any pleading during all this long litigation until the Supreme Court of Arkansas decided that this property in equity belongs to your respondent. If these lands had become worthless due to sandstorms, earthquakes, tornadoes, erosion, floods, or other causes they would not now question the Arkansas court's decision and certainly they could not be forced by law for any reason to redeem or pay back to respondent any part of the $8,303.13. Petitioners now say that your respondent had the statutory right to redeem from Mrs. Maud Bird despite the decision of the Supreme Court of Arkansas and contrary to their former continuous insistence and answer herein on this question as appears at R. 40. (See also R. 134-135—Defendant's Answer to Amendment to Amendment No. 2).

As respondent, Wade Kitchens, and J. B. Wilson at the time of the execution and foreclosure sale owed no duty to each other and were dealing at arm's length, petitioners have no right to a recovery on any theory. They cannot now recover, redeem, or now contribute, claiming through

their father, J. B. Wilson. He knowingly lost all his rights when he refused to redeem or have anything to do with the lands involved in this action. Petitioners are now precluded from claiming the loss of the lands included in the Lester foreclosure. They never did own these lands. Petitioners are now estopped to claim lack of due process when they and their ancestor had their rights fully adjudicated in the courts in the State of Arkansas, that is, the Chancery Court of Columbia County, the county in which the lands are located, and the Supreme Court of Arkansas, to which the case was appealed and affirmed.

They stated no Federal question in any of their pleadings in either of the actions. They lost in the trial court and in the Supreme Court of Arkansas and made no claim of lack of due process until they filed a Petition for Rehearing in the Supreme Court of Arkansas. The case was thoroughly considered and decided by the courts of Arkansas. The decision of the courts of Arkansas and, particularly the court of last resort on the issue as to the title to the lands involved, is binding upon the Supreme Court of the United States and a contention based on an assertion of lack of due process cannot and should not be considered by the Supreme Court of the United States, no Federal question being involved.

AS RESPONSE TO THE FIVE ALLEGED LEGAL AND EQUITABLE PRINCIPLES POSED BY PETITIONERS, RESPONDENT, WADE KITCHENS, SAYS:

1. At no time did petitioners ever own the lands herein involved except Mrs. Maud Bird purchased said lands at the foreclosure sale and then accepted from respondent $8,303.13 for her entire interest in said lands, 104 days after the time for redemption had expired.

2. Respondent did not redeem from the foreclosure sale. Petitioners alleged that he had neither the legal nor

equitable right to redeem (R. 40; 134-135) and the Supreme Court of Arkansas agreed with them. In fact, at the insistence of petitioners in the original action to set aside the execution sale held on July 24, 1936, the Supreme Court of Arkansas decided that respondent lost his right of redemption from the execution sale.

3. The Supreme Court of Arkansas did find that there was an agreement on the part of Mrs. Maud Bird to permit Kitchens to redeem. The Supreme Court of Arkansas construed the acts of the parties and found that Mrs. Maud Bird when she accepted on December 23, 1938, from the Clerk of the Chancery Court of Columbia County, Arkansas, the money of the respondent, after the year for redemption under the statute by her father, J. B. Wilson, had expired, parted with all her interest in the land and since her father failed to redeem from her or respondent, the title to these lands vested in your respondent, Wade Kitchens, by equitable assignment.

4. Petitioners continually urge now there was a redemption from a mortgage by respondent. This is contrary to their allegations and contentions throughout all of this litigation. The Lester mortgage and lien were merged into a decree and the decree was fully executed, the property was sold, the decree was settled and satisfied in full. There was no longer any debt, decree, mortgage or lien. Continuous repetition of the claim that respondent redeemed from a mortgage cannot make the transaction of respondent, Wade Kitchens, with Mrs. Maud Bird, a statutory redemption.

In all of the lower court hearings petitioners contended there was no fiduciary relationship between their ancestor, J. B. Wilson, who died in 1946, and your respondent, Wade Kitchens, at the time of the execution sale or at the time of the foreclosure sale and insisted that they were dealing at arm's length. The Supreme Court of Arkansas agreed with them. Petitioners now reverse their position in this

lawsuit because they lost on their previous contentions. It must be remembered that nowhere in any of the pleadings did J. B. Wilson or petitioners ever claim a fiduciary relationship existed between J. B. Wilson and respondent, Wade Kitchens, until the Supreme Court of Arkansas, on April 16, 1951 (Rehearing denied June 4, 1951) decided these particular lands became the property of respondent, Wade Kitchens, by equitable assignment. If there had been a fiduciary relationship at the time of the execution sale then the Supreme Court of Arkansas would, no doubt, have allowed your respondent, Wade Kitchens, to redeem from the execution sale or contribute his part of the indebtedness for which the execution sale was held. This Honorable Court no doubt, if such had been the case, would have granted his Petition for a Writ of Certiorari in case No. 390 when your respondent, Wade Kitchens, sought certiorari to prevent J. B. Wilson and his heirs from taking the property of the respondent. There had been no fiduciary relationship. No theory advanced by petitioners is tenable.

5. The Supreme Court of Arkansas affirmed and approved the decision of the Chancery Court of Columbia County, Arkansas, cited and relied upon its own decisions, the general law, the rules of equity and the almost unanimous decisions of other State Supreme Courts to justify it in finding an equitable assignment of the property from Mrs. Maud Bird to respondent, Wade Kitchens. The Supreme Court followed and applied a well recognized, established and equitable precedent to sustain the ruling and deprived petitioners of no property whatever. In fact, when Mrs. Maud Bird, on December 23, 1938, accepted the $8,303.13 from respondent, neither J. B. Wilson, and certainly none of the petitioners, his descendants, could have had any interest in the lands involved herein.

Petitioners in paragraph 2 of their Petition for Rehearing in the Supreme Court of Arkansas (R. 189) stated:

"The conclusion that there was an equitable assign-

ment does not follow if we view the transaction between Mrs. (Maud) Bird and Mr. Kitchens, for what it actually was, a statutory redemption from the mortgage sale."

The Supreme Court of Arkansas refused to take such view and such a view would have been contrary to the contentions and allegations in the answer of petitioners in the original cause of action and in their answer on the issues posed in the Lester foreclosure proceedings and the lands involved therein.

Petitioners seek herein to be allowed to redeem at this late date from respondent or to contribute part, or even all of the $8,303.13 to respondent, Wade Kitchens, in order to obtain the lands at this time. It must be remembered that your respondent, Wade Kitchens, at the October, 1949 Term of this court, case No. 390, pleaded for the right to redeem from the execution sale manipulated by Mr. J. B. Wilson in such a way as to prevent respondent from being able to redeem and in every event to plead the right to contribution. His Petition for Writ of Certiorari was denied and to now allow petitioners such a right and grant them the right to redeem in violation of the Arkansas Statutes after more than 13 years or to allow them to make contribution at this time when no such offer was ever heretofore made would, in itself, be a denial to your respondent of the equal protection of the law which the Constitution of the United States guarantees to the citizens of this country.

ANSWER TO PETITIONERS' PETITION AND ARGUMENT

In response to petitioners' petition and argument, respondent relies upon three points, any one of which we submit is properly the basis for denial of the Petition for Writ of Certiorari:

First, the alleged Federal question was not raised until

after the decision of the Supreme Court of Arkansas affirming the trial court, and was then raised on Petition for Rehearing in the Supreme Court of Arkansas. The Supreme Court of Arkansas denied the Petition for Rehearing without further opinion, and under the rule as announced by this court many times, such actions precludes consideration by this court of the merits of the allegation of a Federal question;

Second, there is no Federal question involved here, but merely a State Supreme Court's pronouncement of the law of that State, which is not reviewable by the Supreme Court of the United States on Writ of Certiorari, even should it be determined that the State Court was in error;

Third, the Supreme Court of Arkansas, in applying to the facts before it the doctrine of equitable assignment was correct in applying a recognized equitable doctrine to a fact situation very similar to other situations in which other courts have applied the same doctrine.

In the order named, we will take up and discuss each of the above points.

A. TIMELINESS OF THE PRESENTATION OF AN ALLEGED FEDERAL QUESTION.

Should it be assumed that a Federal question exists in the instant case, and that petitioners would be entitled to a review of such a question, it would then become important whether or not a raising of such Federal question were timely, for if petitioners did not raise the question in time, the Supreme Court has no jurisdiction to grant the petition prayed for.

In this case, the trial court applied to the facts presented to it the doctrine of equitable assignment. (R. 174). At that time, petitioners knew full well that the property involved in the litigation had been declared to be the property of Wade Kitchens, respondent herein. Petitioners at

that time had ample opportunity to raise any alleged Federal question which was involved in the case. Their first opportunity to raise a Federal question came in the trial court itself when they moved to recall and set aside the findings of the court. This pleading will be found at (R. 178-180). Obviously, they did not raise the question in the trial court. They next had the opportunity of raising any Federal question which they might have in the appeal to the Supreme Court of Arkansas. Although the printed record does not make clear what issues were raised in the Supreme Court, by reference to Section 6 of the Petition for Rehearing in the Supreme Court (R. 191), we see that obviously this is the first time any alleged Federal or constitutional question was mentioned, and we are convinced that petitioners will not deny that in Section 6 of the Petition for Rehearing the alleged Federal question which they now urge was raised for the first time.

Under such circumstances, can it be said that the alleged Federal question was raised in time? We think not. Of the many decisions of this court which have determined the question of timeliness, we wish to refer to only a few which we submit aptly state the question and its determination.

In

Citizens National Bank v. Durr,
257 U. S., 99;
66 L. Ed. 149, 152,

the court stated:

> "After the final decision, in an application to the supreme court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance. *This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this court.* Loeber v. Schroeder, 149 U. S. 580, 585, 37 L.

Ed. 856, 859, 13 Sup. Ct. Rep. 934; Fullerton v. Texas, 196 U. S. 192, 193, 49 L. Ed. 443, 444, 25 Sup. Ct. Rep. 221; Cockran Oil Development Co. v. Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143, 150, 26 Sup. Ct. Rep. 41." (Italics ours).

And in

American Surety Co. v. Baldwin,
287 U. S. 156,
77 L. Ed. 231,

it was held:

"*Appeal, § 435—to Supreme Court of United States from state court—Federal question first raised on petition for rehearing in state court.*

2. A claim that a judgment of a state court is void under the due process clause of the Fourteenth Amendment as having been entered without notice and opportunity to be heard in not seasonably made, so as to serve for a basis of review in the Supreme Court of the United States, where first raised by a petition for rehearing of an appeal to the highest court of the state from an order of a lower court setting aside the judgment, *the claim of want of notice having previously been raised throughout the proceedings solely as a matter of state law.*" (Italics ours here).

It will be noted, in the above case, that the want of notice which was insisted upon as the basis for the Federal question had been raised, but only as a matter of State law. This is analogous to the instant situation, for the questions which petitioners wish to have reviewed were raised in the State Courts, but only as questions of State law. Two annotations in the Lawyers' Edition of the Supreme Court Reports deal with this question. In the first of these, an annotation in 67 L. Ed. at page 557, the text writer states:

"In holding that an attempt to raise a question of repugnancy of a state statute to the Federal Constitution for the first time in a petition for a rehearing of

a final decision of the State court is made too late to sustain the jurisdiction of the Federal Supreme Court to review the decision of the State court, ROOKER V. FIDELITY TRUST CO. reaffirms *the established rule that a Federal question cannot, for the first time, be raised in a petition to the highest court of the state for a rehearing,* after a final decision by that court, so as to sustain the appellate jurisdiction of the Federal Supreme Court over the State court, *where it appears that the State court dismissed the petition without considering the Federal question raised, and without assigning reasons for dismissing the petition.*" (Italics ours).

The citations in support of the text material are too numerous to reproduce here.

In another annotation in 79 L. Ed. 1539, it is said:

"Ordinarily, a Federal question first presented in a petition for rehearing to the highest court of the state, after a final decision of that court, and there denied without opinion, *is raised too late to sustain the appellate jurisdiction of the Federal Supreme Court over the State court.* American Surety Co. v. Baldwin (1932) 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98, 77 A. L. R. 298; Live Oak Water Users' Asso. v. Railroad Commission (1926) 269 U. S. 354, 70 L. Ed. 305, 45 S. Ct. 149; McGarrity v. Delaware River Bridge Commission (1934) 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565 (rehearing denied in (1934) 292 U. S. 607, 78 L. Ed. 1468, 54 S. Ct. 771). (Italics ours).

* * *

But an attempt to raise a Federal question in a State court after judgment, upon a petition for rehearing, does not furnish a basis for review by the Federal Supreme Court unless the State court actually entertains the question and decides it. Ibid."

In the light of the above authorities, we do not think that it can be doubted that this court should dismiss the

Petition for Writ of Certiorari because it was not timely. It was raised only as a means of protracting the litigation here involved. As we will point out shortly, the question raised is not, in fact, one of Federal law, but one of State law, but even were it a question of Federal law, there can be no doubt but that the Federal questions were neither raised in nor determined by the Supreme Court of Arkansas in *Wilson v. Kitchens.*

B. NO FEDERAL QUESTION IS PRESENT HERE.

Petitioners have attempted to raise a Federal question based on want of due process in violation of the Fourteenth Amendment to the Constitution of the United States. In the light of the litigation in this case, covering a period of more than thirteen years, during which time two appeals were tried in the Supreme Court of Arkansas, we fail to see how petitioners can solemnly allege that they have been denied due process. Certainly, if petitioners have not had their day in court in this case, then it cannot be said that the courts of the State of Arkansas are capable of resolving litigation. Petitioners have not only had their day in court, but they have indeed won far more than they have lost. In the first appeal of this case (R. 122-128), petitioners won over four thousand acres of land, which had formerly belonged to respondent, Wade Kitchens, and also valuable city, residential and business properties in Waldo and Magnolia, Arkansas. Certainly, it must be admitted that they have won more than they have lost, and if there has not been due process in this case, then respondent is more the loser than are petitioners.

In an annotation in 84 L. Ed. 925, on Supreme Court's review of State decisions, it is said:

> "So, the bare claim that the judgment of the highest State court operated to take property of the plaintiff in error without compensation is not enough to justify the Federal Supreme Court in taking jurisdiction of

a writ of error to the State court *unless it also appears from the averments of fact upon which the claim must depend that the question is real and substantial and not so utterly without merit as to be frivolous, and that it is not concluded by a previous decision.* Consolidated Turnp. Co. v. Norfolk & O. V. R. Co. (1913) 228 U. S. 596, 57 L. Ed. 982, 33 S. Ct. 605.

* * *

"A preliminary step in showing that the State court's decision turned on a Federal question and one which the United States Supreme Court has uniformly recognized as essential *is to show that such a question actually arose in the case.*" (Italics ours).

In

Central Land Co. v. Laidley, 159 U. S. 103;
40 L. Ed. 91, 94,

this court held that where the impairment of contract was not by the Legislature of the State, but by decision of the Judicial Department, only, then no Federal question is presented. In holding, the court said:

"The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that, *by the decision of the Supreme Court of Appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error, has been impaired, and the plaintiff in error has been deprived of its property without due process of law.*

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, *we are of opinion that they present no Federal question.*

In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract

have been impaired, but it must have been impaired by some act of the legislative power of the state, *and not by a decision of its judicial department only.*" (Italics ours).

Obviously, the same would apply to the allegation that the Judicial Branch, by its decision, deprived petitioners of their property without due process of law. The Legislative Branch certainly was not guilty of any such act, and if the Judicial Branch be held to have taken petitioners' property, then it was only done after full hearing of the evidence and contentions of the parties. If this court adopts the view that every decision in which one of the parties loses real property presents the question of whether the property has been taken without due process of law, then this court will be subjected to innumerable petitions for writ of certiorari.

In

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382, 385,

a case which, incidentally, was cited also by petitioners in their Brief, it was stated by the court:

"... The parties to this action have been fully *heard in the state court in the regular course of judicial proceedings*, and in such a case *the mere fact that the state court reversed a former decision, to the prejudice of one party does not take away his property without due process of law.* This was expressly held in the case of Central Land Co. v. Laidley, 159 U. S. 103, 112, 40 L. Ed. 91, 94, 16 Sup. Ct. Rep. 80. See also Morley v. Lake Shore & M. S. R. Co., 146 U. S. 162, 171, 36 L. Ed. 925, 930, 13 Sup. Ct. Rep. 54; Patterson v. Colorado, 205 U. S. 454, 461, 51 L. Ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689; Delmar Jockey Club v. Missouri, 210 U. S. 324, 335, 52 L. Ed. 1080, 1084, 28 Sup. Ct. Rep. 732; Bonner v. Gorman, 213 U. S. 86, 91, 53 L. Ed. 709, 711, 29 Sup. Ct. Rep. 483; Milwaukee Electric R. & Light Co. v. Wisconsin, 252

U. S. 100, 106, 64 L. Ed. 476, 480, 10 A. L. R. 892, 40 Sup. Ct. Rep. 306." (Italics ours).

Certainly the language found in the above decision is equally applicable in the instant case.

Nor can it be argued that if the State Court's decisions are erroneous, and thereby cause the loss of property, this constitutes a taking of property without due process.

In

Bonner v. Gorman, 213 U. S. 86,
53 L. Ed. 709, 711,

this very question was considered, and it was there stated:

> "It is firmly established that, *when parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States* (Central Land Co. v. Laidley, 159 U. S. 112, 40 L. Ed. 94, 16 Sup. Ct. Rep. 80), . . . Moreover, 'according to the well-settled* doctrine of this court (92) with regard to cases coming from states courts, *unless a decision upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed.*' Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. Ed. 201, 28 Sup. Ct. Rep. 78; California Powder Works v. Davis, 151 U. S. 389, 38 L. Ed. 206, 14 Sup. Ct. Rep. 350; St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616.
>
> Writ of error dismissed." (Italics ours).

We will discuss, in the next section, the merits of the case and the question of whether or not the Supreme Court of Arkansas was actually in error. Suffice it to say here that even should it be determined that the Supreme Court of Arkansas was in error, it is clear that such error cannot constitute the basis of a review of the State Court's decision by this court. If there has been due process—if the

parties have been heard in the regular course of judicial proceedings, and they certainly have been heard in the case at bar, then there has been due process of law, and regardless of the outcome, the Supreme Court of the United States does not have jurisdiction to review the case on its merits.

C. THE MERITS OF THE CASE.

a. *Statement of the Facts.*

In considering the case on its merits, we submit that certain facts developed are essential to a proper understanding of the problem.

The facts pertinent here are practically undisputed.

In 1936 Wade Kitchens and J. B. Wilson owed a debt amounting to more than $10,000.00 including interest due to R. S. Warnock. This debt had been reduced to judgment. Warnock had an execution issued which resulted in a sale of that portion of the property involved in this branch of the case which belonged to Wade Kitchens, together with other lands belonging to Wade Kitchens. This execution sale was held valid by the Supreme Court of Arkansas in an opinion rendered May 16, 1949 (Bird v. Kitchens, 215 Ark. 609, 221 S. W. 2d 795). As a result of this decision it must be concluded as the Supreme Court of Arkansas decided that all of the interest which Kitchens then had in the lands sold passed to and vested in, first, Alvin Rogers, the purchaser at the execution sale, and then by his superior, J. B. Wilson, to whom Rogers conveyed the lands by quitclaim deed.

Prior to the judgment on which the execution sale rested, Wade Kitchens and J. B. Wilson had executed to T. P. Lester a mortgage conveying to the said T. P. Lester approximately 1460 acres of land, some of which was owned by Wade Kitchens and some of which was owned by J. B. Wilson and some of which was owned by J. B. Wilson and Wade Kitchens, to secure a principal indebted-

ness in the amount of $5,000.00 and the interest due thereon. Petitioners admit that this mortgage was for a good and valid consideration and was in full force and effect as a first lien on said property at the time of the suit to foreclose the same (See R. 133), we will not discuss the validity of said mortgage.

T. P. Lester brought suit to foreclose this mortgage on June 16, 1936, and obtained a judgment thereon, and on December 30, 1936, assigned and transferred to Mrs. Maud Bird for a consideration of $7,000.00. The amount then due on this mortgage was $7,170.00, for which amount the court gave Lester a judgment on December 16, 1936.

Mrs. Maud Bird, as owner of the judgment in foreclosure, had the property sold on September 11, 1937, and she purchased the property at said sale for the sum of $7,500.00.

Kitchens tried to interest J. B. Wilson in cooperating to redeem this property from Wilson's daughter, and after Wilson had indicated that he no longer had any interest in the lands included in the Lester mortgage, Kitchens wrote to Mrs. Maud Bird asking her permission to redeem, and advising her that he had discussed the matter with her father, who said that he had no further interest in the lands. Mrs. Maud Bird wrote appellee a letter in which she stated that she would be glad to have him redeem the property for the amount paid by her at the sale plus ten per cent interest, taxes and costs. In this letter she stated that she did not know what Kitchens meant by discussing this matter with her father; and further stated: "This was my purchase and my transaction throughout and my father knew nothing about it."

Relying on the representation made to him that Mrs. Maud Bird was acting, not as agent for her father, but in her own right, Kitchens, under the mistaken belief that he had the right to redeem the lands, deposited in the

registry of the court $8,303.13 which constituted the total purchase price of $7,500.00 plus ten per cent interest, taxes and costs, and Mrs. Maud Bird accepted this money from the Clerk on December 23, 1938, 104 days after J. B. Wilson's right to redeem expired.

Kitchens again contacted Wilson in an effort to have Wilson contribute to the purported redemption and, upon Kitchens' advising Wilson that he had deposited the redemption money in the registry of the court, and it had been accepted by Mrs. Maud Bird, on December 23, 1938, 104 days after the time for redemption expired, Wilson told Kitchens, "Well, that is your and Maud's business." Kitchens, in the meantime, had mortgaged the lands involved in the Lester mortgage to his wife, and Mrs. Kitchens had caused this mortgage to be placed on record on September 14, 1938. Kitchens was unable to obtain any help from J. B. Wilson in saving the property, the lands. Respondent, Wade Kitchens, wrote a letter to Mrs. Maud Bird, special delivery, and it was returned with the notation, "Refused by Addressee." This letter, unopened, was introduced into the record and appears as an exhibit. (R. 74-77).

When the letter was returned to Kitchens, he immediately called Mrs. Maud Bird and started to explain to her about the letter and what was in it, but when she found out who was talking, she said, "I am not interested in that matter anymore," and hung up the phone. (R. 148).

Under such facts the contention of appellee (respondent here), which was followed in the Supreme Court of Arkansas, is as follows: When the lands of Wade Kitchens were sold at the execution sale and purchased by J. B. Wilson through Alvin Rogers, the relationship of the parties as joint mortgagors, tenants in common and as joint adventurers was dissolved, along with that fiduciary relationship which the Arkansas Supreme Court held, in the first appeal, no longer existed at the time of the execu-

tion sale. At that sale, J. B. Wilson acquired all of the interest of Wade Kitchens in and to the lands which he had owned. Insofar as his lands in the Lester mortgage were concerned, all Kitchens had was the right to redeem, first, from the mortgage lien, and, second, from the judgment lien after it was perfected. This was admitted by petitioners herein in their Brief in the Arkansas Supreme Court on the first appeal. (R. 154).

After the execution sale, therefore, and before the foreclosure sale, J. B. Wilson had, of the property formerly owned by him and included in the Lester mortgage, the right to redeem, first, from the Lester mortgage, and, later, from the Lester judgment and from the foreclosure sale held thereunder. Legal title had passed to Lester under the terms of the mortgage. (Tiffany on Real Property, 2nd Edition, Vol. 3, page 2361).

As to the lands formerly belonging to Kitchens, Wilson had the right of redemption from the Lester mortgage which had formerly been held by Kitchens and which he, Wilson had purchased at the execution sale. It must be remembered in this connection that the right Wilson then had to *all of the lands* was the same right; i.e., the right to redeem the lands from the Lester mortgage and later the Lester judgment and from the sale thereunder.

When the lands were sold at the foreclosure sale and purchased by Mrs. Maud Bird, Mrs. Maud Bird, as purchaser at the foreclosure sale, acquired the legal title to the property, subject only to the statutory one year right of redemption, which was then held by J. B. Wilson.

b. *The Effect Of Kitchens' Purported Redemption From Mrs. Maud Bird.*

As we have heretofore set out, Mrs. Maud Bird purchased, at the Lester foreclosure sale, the title to all of the property contained in the Lester mortgage. She did this,

not as the agent of J. B. Wilson, or to protect his interest, but in her own right. Mrs. Maud Bird, herself, in her letter (R. 73, Exhibit "BB") advised Kitchens that the purchase was her transaction and that her father had nothing to do with it.

It must, therefore, be assumed that Mrs. Maud Bird, acting as any other third party, purchased the lands at the foreclosure sale. Wade Kitchens, who was not a volunteer, but who had an equitable interest in the property arising out of his then pending suit, undertook to redeem, under the mistaken notion that he could do so, and under the express invitation of Mrs. Maud Bird, who had written him stating that she would be pleased to have him redeem. Inasmuch as he was not by law entitled to redeem, what was the actual effect of this purported redemption?

The Supreme Court of Minnesota, in *Grant, et al. v. Bibb*, (Minn., 1915), 152 N. W. 728, had before it almost the identical problem as the court has before it here. In that case, a person not entitled under the law to redeem, offered redemption money which was accepted by the purchaser at the foreclosure sale. In that case plaintiffs had purchased at a mortgage foreclosure, and defendants had acquired a judgment against the mortgagor. The judgment which defendants had against the mortgagor was in the process of litigation to determine its validity. Defendant sought to redeem, basing his right to redemption on the validity of the judgment which he had obtained against the mortgagor. Plaintiffs allowed the redemption and accepted the redemption money and appropriated it to themselves. Later, the Supreme Court of that state reversed the trial court and set aside the judgment which constituted defendant's only right to redeem. Plaintiffs then brought suit to cancel and set aside the redemption by defendant on the ground that defendant had no right to redeem, and that they were induced by fraud and mistake to accept the redemption money. In that case the court held:

"A judgment creditor, whose judgment is irregular, has no right to redeem from a mortgage foreclosure sale, but if he undertakes to do so, and the purchaser at the sale receives the redemption money and appropriates it to himself, he waives any defect in the title of the holder of the judgment to redeem, *and the redemption thereon operates as an assignment to the redeeming creditor of the rights acquired by the purchaser at the sale.*" (Headnote No. 1). (Italics ours).

"The certificate holder may rescind his acceptance of the redemption money and still assail the right of the redemptioner to redeem if induced by fraud to accept it, and, perhaps, if so induced by mistake. *In this case there was no showing that plaintiffs' purchasers at foreclosure sale, were induced by fraud or mistake to accept redemption money. The fact that the litigation out of which the judgment arose was still pending was patent.* Plaintiffs were put upon inquiry by the fact of redemption. They could not themselves have determined the validity of the judgment, but they could have ascertained that it was still in litigation, *and in that situation they were bound to determine whether they would recognize it as valid or disregard it as invalid.* (Headnote No. 2). (Italics ours).

Applying the factual situation in this case to the case at bar, we find almost identically the same circumstances. In the present case, Mrs. Maud Bird had purchased at foreclosure sale, precisely as had the plaintiffs in the Grant case. At a time when litigation was pending to test the validity of the judgment which constituted defendant's only right of redemption, plaintiffs allowed defendant to redeem. In the present case, at a time when the question of Kitchens' right to redeem was in litigation, Mrs. Maud Bird allowed Kitchens to redeem. The factual situation is almost identical. In that case, the court said:

"We would not want to hold that Bruner had in fact a right to redeem from plaintiffs' mortgage. *We think*

plaintiffs might have refused to recognize his redemption. Had they done so, the attempted redemption would undobutedly have failed upon the reversal of the Bruner judgment as effectually as would an execution sale made to the judgment creditor. *But plaintiffs did not so refuse. On the contrary, they received the redemption money and accepted and appropriated it to themselves.* By so doing they conceded Bruner's right to redeem *and waived any defect in his title to do so.* (Todd v. Johnson, 56 Minn. 60, 57 N. W. 320; Orr v. Sutton, 148 N. W. 1066; McDonald v. Beatty, 10 N. W. 511, 88 N. W. 281; Smith v. Jackson, 153 Ill. 399, 39 N. E. 130; White v. Costigan, 134 Cal. 33, 66 Pac. 78; Millard v. Traux, 50 Mich. 343, 15 N. W. 501); *and the redemption thereupon operated as an assignment to the redeeming creditor of the rights acquired by the plaintiffs at the sale.* G. S. 1913, Sec. 8150.

"It is doubtless true that plaintiffs might rescind their acceptance of the redemption money and still assail the right of the redemptioner to redeem had they been induced by fraud to accept the redemption money. But no fraud is charged.

"It may also be conceded that they might rescind their acceptance of the redemption money and assail the redemption if the money was accepted by them under some mistake *of fact.* But the plaintiffs make no showing of mistake. The judgment had just been procured in a contested lawsuit. Jacobson had taken the steps usually preliminary to an appeal. These facts were patent and the means of information were open to plaintiffs. They knew Jacobson had the right to appeal and that a reversal of the judgment might result. They allege no mistake of fact or of law. *It is not enough to say that they supposed Bruner's judgment to be valid. They were 'put upon inquiry by the fact of redemption.'* Todd v. Johnson, 56 Minn. 60, 67, 57 N. W. 320. Ignorance of one put upon inquiry, due to his failure to inquire, is not mistake. It may be said that, if they had investigated the litigation

out of which the Bruner judgment arose, still they could not have determined that the judgment of the trial court was erroneous. *But they could have determined that the litigation was still proceeding in effort to secure the reversal of that judgment.* In that situation plaintiffs were bound to determine which of two inconsistent courses they would take, whether to recognize the judgment as valid, or disregard it as invalid. They could not do both. *They could not assume the validity of the judgment, acquiesce in the redemption made under it, receive the redemption money, and then, after the judgment was reversed on appeal, rescind their action and cancel the redemption.* Their conduct in accepting and appropriating to themselves the redemption money paid by Bruner for their use was a waiver of any defect in his right or title to redeem." (Italics ours).

There is no logical reason why the Arkansas Supreme Court could not apply the same principle in the case at bar, for here Mrs. Maud Bird knew of the pending litigation and knew or was put upon notice that there was some possibility that Kitchens might not have the right to redeem. By permitting him to redeem and accepting the redemption money, Mrs. Maud Bird waived any defects in his right to redeem and, in the language of the court in the Grant case, "the redemption thereupon operated as an assignment" to Kitchens "of the rights acquired" by Mrs. Maud Bird "at the sale".

In *Ackerman v. First-Trust Joint Stock Land Bank of Chicago, Illinois,* (Iowa, 1940) 291 N. W. 150, the Supreme Court of Iowa was confronted with the same type of problem. Headnote No. 2 shows the ruling of the court:

"Even if a husband's judgment creditor had no right to redeem from mortgage foreclosure sale realty on which husband and wife had executed a mortgage, creditor was entitled to a sheriff's deed *as an 'equitable assignee', where he thought he had a right to redeem and attempted to make a statutory redemption,*

and original purchaser accepted money which creditor paid into clerk's office, surrendered certificate of sale to clerk, and assigned it to creditor." (Italics ours).

In this case, defendant, thinking he had a right to redeem, went through the procedure of a statutory redemption, and as in the present case, the period of redemption expired without the mortgagor redeeming from the defendant. Plaintiffs then brought suit to cancel the redemption, claiming that they were prejudiced by the purported redemption. The court, in holding that this was an equitable assignment, said:

"Appellants concede that if defendant had *purchased* the land from the bank *he would have succeeded to all the rights of the bank and they would have been compelled to redeem within the redemption period.* They contend that because defendant elected to make a statutory redemption *and had no right to redeem, was a stranger to the transaction, he cannot prevail as an equitable assignee.*

"We held in division one that defendant was not an interloper and made a statutory redemption. Assuming the truth of appellants' contention that defendant did not have a right to redeem, we hold that he is entitled to a sheriff's deed to the land *as an equitable assignee. Defendant clearly thought he had a right to redeem from the sale and attempted to make a statutory redemption.* The bank accepted the money that the defendant paid into the clerk's office and surrendered the certificate to the clerk, assigning it to the defendant. *As between the bank and defendant, the redemption was accomplished. It could make no difference to appellants whether the original purchaser or defendant was the holder of the certificate.*

"Our conclusion is sustained by prior decisions of this court.

"In Gilbert v. Husman, 76 Iowa 241, 41 N. W. 3, 4, the plaintiffs did not have a statutory right to redeem because they were strangers to the title. The

court states: 'The contention of counsel for the appellant is that the transaction between the plaintiffs and Parks amounted to the payment of the prior lien by a stranger to the title; that the plaintiffs were mere intermeddlers. This, we think, is a mistake. *When all the controverted facts are eliminated, the transaction amounted to this: The plaintiffs, under the mistaken notion that they had such right, desired to redeem, and Parks directed them to pay the money to the clerk.* They did so, and Parks received the money from the clerk and left the certificate of purchase with the latter. *This, we think, amounted to an equitable assignment of the certificate, and thereunder the plaintiffs are entitled to all the rights of Parks.* The money was paid at the place and to the person directed by the latter, and although he had previously declined to assign the certificate, *the receipt of the money and delivery of the certificate clearly, in our opinion, amounted to an equitable assignment of the latter.*' See Hurn v. Hill, 70 Iowa 38, 29 N. W. 796, and Byer v. Healy, 84 Iowa 1, 50 N. W. 70." (Italics ours).

Applying this case to the case at bar, we find that Kitchens, under the mistaken idea that he had the right to redeem, undertook a statutory redemption. Mrs. Maud Bird (taking the place of the purchaser) permitted him to redeem, and petitioners in the present case now claim that this prejudiced them, that the redemption should have no effect whatever. But here, as in the Ackerman case, petitioners, as the descendants of J. B. Wilson, are in no worse shape than would they have been had the property remained in the hands of the purchaser. J. B. Wilson had the same right to redeem from Kitchens that he had from Mrs. Maud Bird. He could have accomplished this by taking the same statutory steps. Inasmuch as he failed to do so, his rights are foreclosed by the expiration of the one year statutory right to redeem. In the present case, as in the Ackerman case, "as between the bank (Mrs. Maud Bird) and defendant (Kitchens), the redemption

was accomplished. It could make no difference to appellants (Wilson and his descendants) whether the original purchaser or defendant was the holder of the certificate."

In the Ackerman case, the Iowa Supreme Court refers to Gilbert v. Husman, 76 Iowa, 241, 41 N. W. 3, 4. Let us look at this case for an almost exact analogy in facts to the case at bar.

Here, the owner of the land in question executed a mortgage to one Wilcox and then conveyed the land subject to the mortgage to Dage. Myres, a creditor of Dage, obtained a judgment against him, which became a lien on the land. Dage then conveyed to the plaintiff in that case. One month later, Myres had an execution levied and the land was sold at an execution sale. There was no redemption from the execution sale and the sheriff then made a deed to the purchaser at the execution sale, who then conveyed to the defendant.

Wilcox, who held the prior mortgage lien, then foreclosed his mortgage and the land was sold under the foreclosure decree to one Parks. One day before the one year period for redemption had expired, plaintiff, being the grantee of the execution debtor, attempted a statutory redemption and, although his right of redemption had been sold, Parks, the purchaser at the foreclosure sale, accepted the redemption money and left the certificate with the clerk, although he did not assign it to anyone and had previously declined to assign it to the plaintiff.

In this case, in holding that the grantee of the execution debtor was an equitable assignee, having had his redemption money accepted by Parks, the court said:

> "It is conceded by counsel for appellee that the plaintiff did not have the statutory right to redeem, because they were strangers to the title. *Whatever title they had under the conveyance from Dage was divested by the sale and conveyance under the Myres judgment.* The contention of counsel for the appellees,

however, is that the transaction between Parks and appellees amounted to a purchase and equitable assignment of the certificate of purchase, and thereby they became invested with all the rights of Parks. *The defendant undoubtedly owned both the legal and equitable title, subject, however, to the superior lien and right of Parks.* In fact, *unless the defendant exercised his statutory right to redeem, Parks could obtain an absolute title to the land in controversy by a conveyance by the sheriff.* The contention of counsel for the appellant is that the transaction between the plaintiffs and Parks amounted to the payment of the prior lien by a stranger to the title; that the plaintiffs were mere intermeddlers. *This, we think, is a mistake. When all the controverted facts are eliminated the transaction amounted to this: The plaintiffs, under the mistaken notion that they had such right, desired to redeem, and Parks directed them to pay the money to the clerk. They did so, and Parks received the money from the clerk and left the certificate of purchase with the latter.* This, we think, amounted to an *equitable assignment of the certificate, and thereunder the plaintiffs are entitled to all the rights of Parks.* The money was paid at the place and to the person directed by the latter, and, *although he had previously declined to assign the certificate, the receipt of the money and delivery of the certificate clearly, in our opinion, amounted to an equitable assignment of the latter.* These views are, to an extent at least, supported by Hurn v. Hill, 70 Iowa, 38 29 N. W. Rep. 796. The judgment of the district court is affirmed." (Italics ours).

The almost exact analogy in factual situation of this case to the case at bar, is, indeed, remarkable. The plaintiff in the Gilbert case stands in the same position as does Kitchens in the case at bar. The defendant, being the grantee of the purchaser at the execution sale, stands in the same position as does Wilson who was the grantee of Alvin Rogers, the purchaser at our execution sale. Parks stands in the same position precisely as does Mrs. Maud

Bird, who purchased at the foreclosure sale. When Mrs. Maud Bird accepted the redemption money and J. B. Wilson allowed the one year statutory period for redemption to expire, his rights were cut off precisely as were the rights of defendants cut off in the Gilbert case.

Thus, we see that, although it is not necessary that the factual situation be precisely the same for one case to stand as an authority in another, the case upon which the court relied in the Ackerman case has almost identically the same factual situation as exists here.

The same question was presented to the Supreme Court of Montana in *Dipple v. Neville*, (Mont., 1928) 267 Pac. 214, 220. In that case, as in the Ackerman case, persons entitled to redeem, who had permitted their one year redemption period to expire, were seeking to escape the effect of their failure to redeem by asserting that the party who redeemed had no authority to do so. In that case the court said:

> " . . . A redemption is but a compulsory sale of the title acquired by the purchaser at decretal sale, *and, as the judgment debtor may redeem from either the purchaser or the redemptioner, it should be a matter of indifference to him whether the purchaser holds the title or parts with it by reason of a voluntary assignment of the certificate of sale,* or by redemption by one entitled to redeem, or by constituting another a 'redemptioner' by the acceptance of the redemption money from him. *The purchaser at sheriff's sale or person holding the sheriff's certificate of sale, and the person redeeming it, are the only persons concerned in the regularity of a redemption.* North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 476, 117 N. W. 453, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717, and cases therein cited. That such a rule seems to be correct in principle is declared in a note found in 29 L. R. A. (N. S.) 508, as redemption statutes, being remedial in character, are to be liberally construed.

"In Rosse v. Gove, 32 Colo., 522, 77 P. 246, it is held that a redemption by a redemptioner operates to transfer the rights of the creditor who made the sale to the one redeeming, providing the redeeming creditor has the right to redeem, *and, if the holder of the certificate of sale accepts the redemption money, the rights of the redeeming creditor are the same as though his redemption was in all respects valid; that the matter is between those two, and no one else may question the validity of the redemption.*

"In White v. Costigal, 134 Cal. 33, 66 P. 78, it is held that one, unqualified to redeem, *whose money is accepted and retained, becomes an equitable assignee of the interest of the party from whom he redeemed and entitled to have his equitable right perfected.*"

* * * * *

"Section 9443, Revised Codes 1921, gives the judgment debtor the right to redeem any time within one year from and after the sale, and the only mention of such a party thereafter is found in Section 9444, which, after providing for successive redemptions by redemptioners within periods of 60 days, declared:

" 'But in all cases, the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property.'

"The legislative intent is therefore clearly expressed in the statute *and thereunder no redemption by a redemptioner tolls the period of limitation fixed for the judgment debtor, nor can any action of the redemptioner shorten that time; in all cases he has the entire year 'from the date of the sale' in which to redeem.*

"It was immaterial what action was taken by Hart-Parr Company during the year it was given to redeem. Had it redeemed within a month after the sale, Dipple still had his year of redemption, *but at the expiration of the statutory time, his right ceased to exist and he could not thereafter question the title of defendants who acted within the time given them by*

the statutes. Rosse v. Gove, above." (Italics ours).

The analogy between this case and the case at bar is obvious. It was held here, as in the Dipple case, that appellants, (petitioners here) as the descendants of J. B. Wilson, cannot complain because the purchaser at the foreclosure sale permitted Kitchens to redeem although he had no legal authority to demand such a right, in view of the fact that their one year under the statute was not interfered with in any way by Kitchens' redemption. Their ancestor, J. B. Wilson, could have deposited his money in the registry of the court and could have effected a redemption from Kitchens as easily as he could have from Mrs. Maud Bird. In considering this point, it must be remembered that Mrs. Maud Bird, by her own statement, was acting in her own behalf; the purchase was hers, she was not trying to protect her father.

In *Duff v. Randall,* (Calif., 1897) 48 Pac. 66, 67, the Supreme Court of California said:

> "Although the right of a mortgagor to redeem the mortgaged premises is not cut off until the expiration of the time allowed for redemption, *yet the purchaser at a sale under the judgment rendered in the foreclosure suit acquires the same interest in the property sold as does a purchaser in property sold under an ordinary money judgment.* 'Upon the sale the purchaser acquires all the right, title, interest and claim of the debtor thereto' . . . *and only the right to redeem from this sale is left in the mortgagor.* If a redemption is made by the mortgagor it is not from the lien of the mortgage, *but from the sale under the judgment,* and the amount which he is required to pay under such redemption is not the amount of the mortgage, *but the amount for which the property was sold.* Prior to the entry of the judgment the mortgagor holds the title to the property subject to the lien of the mortgage, and after the judgment is entered, and before the sale, he holds it subject to the lien of the judgment; *but after the sale he has only a right of*

redemption, while the purchaser has the entire beneficial interest in the property, subject to be defeated by a redemption from the sale. 'The execution of the deed gives to the purchaser at the sale no new title to the land purchased by him, but is merely evidence that his title has become absolute.' Robinson v. Thornton, 102 Cal. 680, 34 Pac. 121. 'The purchaser obtains an inchoate right, which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. *The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid and paid by the purchaser.* The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. *If not paid within the time, the right to a conveyance becomes absolute* without any further sale, or other act to be performed by anybody.' " (Italics ours).

This provides a clear and concise statement of what has happened in the case at bar. Upon the foreclosure sale the purchaser, Mrs. Maud Bird, acquired all the right, title and interest in the property, leaving in J. B. Wilson only the right to redeem from the sale. Since he did not exercise that right within the period of limitation, that right was forever lost to him and his descendants. Inasmuch as Mrs. Maud Bird obviously lost her right in the property when she accepted the full amount of Kitchens' money, the title to the land vested in Kitchens by equitable assignment upon expiration of Wilson's statutory right to redeem.

Another Minnesota case, Johnson v. Melges, et al., (Minn., 1925) 203 N. W., 983, is significant:

"Defendants do not question the validity of the foreclosure nor the regularity of the redemptions. They base their defense on the claim that the mortgage held

by plaintiff was void for usury *and gave him no right to redeem.* They are not in position to attack the validity of his redemption. *When the period for redeeming from the foreclosure sale expired, all the estate or interest which they had in the property terminated.* Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441; Gates v. Ege, 57 Minn. 465, 59 N. W. 495. *Their title passed to and vested in the purchaser at the sale, or his transferee,* subject only to the right of redemption possessed by subsequent creditors. *By Lifson's redemption, the title passed to and vested in him subject only to the right of redemption asserted by plaintiff.* Lifson was the only person in position to object to the redemption by plaintiff. *He waived any right he may have had to object to it, by accepting the redemption money* and subsequently quitclaiming the property to plaintiff. Finnegan v. Effertz, 90 Minn. 114, 95 N. W. 762; Orr v. Sutton, 127 Minn. 37, 148 N. W. 1066, Ann. Cas. 1916 C, 527; Grant v. Bibb, 129 Minn. 312, 152 N. W. 728.

"The title acquired by plaintiff under his redemption is now beyond question *even if the mortgage had been usurious and void;* . . . " (Italics ours).

Defendants in the Johnson case are in the same position as are the petitioners in this case. They have not questioned the validity of the foreclosure, but, instead, rested their defense on the fact that plaintiff had no right to redeem. But here, as in that case, "when the period for redeeming from the foreclosure sale expired, all the estate or interest which they had in the property terminated." "Their title passed to and vested in the purchaser at the sale, or his transferee." The only person who could question the redemption was Mrs. Maud Bird. She is in the same position as Lifson in the Johnson case. "He waived any right he may have had to object to it, by accepting the redemption money."

Nor can appellants contend that Arkansas has not applied the principle of subrogation. In *Neff v. Elder,*

84 Ark. 277, 105 S. W. 260, one Lane had conveyed lands to Curtis in return for Curtis' conveyance of Illinois lands to Lane. It later appeared that the Illinois land conveyed to Lane by Curtis was subject to a lien for taxes in the amount of several hundred dollars and, to the extent of that lien the consideration to Lane was not paid. Shortly after Curtis acquired the property he conveyed by mortgage to Pixley. After execution of this mortgage, but before any further disposition was made of the property, Lane sued Curtis for the taxes paid on the Illinois property and asserted a vendor's lien on the Arkansas property. The lien so asserted did not appear of record anywhere until after the mortgage to Pixley. After suit was instituted by Lane, Curtis sold his right to redemption to Robinson and Pixley assigned the mortgage to Robinson. Robinson then assigned the mortgage to Simon as collateral security on a loan. Thereafter Robinson conveyed to appellant, Neff, with the understanding that part of the purchase price so paid would go to pay off the Pixley mortgage which Robinson had assigned to Simon and the mortgage was satisfied of record. Lane obtained a judgment and a vendor's lien arising out of the suit which he had filed, and the property was sold to satisfy this lien, Elder and others being the purchasers. The sale was confirmed. Neff then sued the purchaser to set aside the conveyance alleging irregularities and this relief was denied. He then petitioned for a bill of review in the suit to foreclose the Lane vendor's lien and this was also refused; whereupon, Neff appealed. The Supreme Court of Arkansas held that although the foreclosure was proper and the irregularities alleged in the complaint to set aside the sale were cured by the confirmation, Neff was entitled to subrogation on the Pixley mortgage which had been executed by Curtis before notice, either actual or constructive of the vendor's lien, was available. The court stated:

"2. Is the appellant, Neff, entitled to subrogation

to the lien of the Curtis mortgage? This mortgage was executed prior to the commencement of the Lane suit against Curtis, and neither the mortgagee, Pixley, nor the assignee thereof, was chargeable with notice of the pendency of that suit. The mortgage being good as to Pixley, his assignees are protected, even though the suit was pending at the time of the several transfers of the debt and mortgage.

"The alleged vendor's lien of Lane and wife which was not expressed in the face of their deed, if it can be held that they had lien at all, even against the grantor Curtis, was not available against subsequent purchasers without actual notice. Scott v. Orbison, 21 Ark. 202; Holman v. Patterson, 29 Ark. 357.

"The evidence shows that appellant purchased this property from Robinson, and paid the price of $2,000 for it without any notice of the pendency of the Lane suit, or of the assertion by the Lanes of any lien on the land. It was agreed between appellant and Robinson that the Curtis mortgage should be satisfied out of the purchase price paid by appellant. This was done, and the mortgage and note were delivered to appellant. The mortgage was then a valid and subsisting lien in the bank, which held it as collateral security by assignment either from Simons or Robinson, and appellant's money was used in discharging the lien. He is, we think, entitled to be subrogated to the mortgage lien. 2 Story, Eq. Jur. Sec. 1237; Sheldon on Subrogation, Sec. 30; Chaffe v. Oliver, 39 Ark. 531; Goldsmith v. Stewart, 45 Ark. 149; Neel v. Carson, 47 Ark. 421; Meher v. Cole, 50 Ark. 361; Wyman v. Johnson, 68 Ark. 369; Union Mort. B. & T. Co. v. Peters, 72 Miss. 1058, 30 L. R. A. 829.

"One of the earliest applications of the principle in this country was made by Judge Story in the case of Bright v. Boyd, 1 Story, 478, and the language of that learned judge is peculiarly applicable here. 'Here is,' he said, 'still another broad principle of the Roman law which is applicable to the present case. It is that where a *bona fide* possessor or purchaser of real estate

pays money to discharge any existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him.'

"Applications of this doctrine bearing close analogy to the facts of the present case are found in Chaffe v. Oliver, 39 Ark. 531, and Wyman v. Johnson, 68 Ark. 369, where lenders of money on defective mortgages for the purpose of discharging prior valid mortgages upon the property, for which purpose the money was used, were held to be entitled to subrogation to the right of the prior mortgages. In one of these cases the last mortgage was defective by reason of an informal certificate to the wife's acknowledgment, and in the other case the mortgagors had no title to the premises nor authority to execute the mortgage."

And in *Pickett et al. v. Merchants' National Bank of Memphis, et al.*, 32 Ark. 346, the court had under consideration the right to subrogation of one who paid a mortgage indebtedness on land where the payer was personally liable for the indebtedness and the person against whom subrogation was sought owned the mortgaged property. There Saffarans had purchased the property at a foreclosure sale, subject to several liens. He sold the lands to Mrs. Pickett a short time after his purchase. One Wormley, who was personally liable on some of the liens, paid off the liens. In dealing with the equities of the parties under such circumstances, the court said:

" . . . According to the contract of Saffarans, he was bound to take up and extinguish these debts; when taken up, they became extinguished, and ceased to be a charge upon the lands; not so, however, when a third party, *who was under an obligation to pay*, does so, and takes the debt; as to Saffarans, it is still a debt, *one which he undertook to pay*, and having failed to do so, it became a charge upon the land for payment." (Italics ours).

This situation is analogous to the one at bar, for here Rogers purchased the Lester lands at the execution sale subject to the mortgage lien thereon which was then held by T. P. Lester. Defendants, Mrs. Maud Bird, et al., urged in their briefs that the reason no more than $500.00 was paid for these lands was that only the right thereto subject to the mortgage indebtedness was purchased, and the lands were, therefore, not worth more than this amount because it would be necessary for the purchaser to also pay off the mortgage indebtedness. Wilson, upon purchasing from Alvin Rogers, could occupy no better position than could Alvin Rogers. He is in the same position as was the appellant, Mrs. Pickett, in the Pickett case, who had purchased from Saffarans. Thus, defendants' ancestor, J. B. Wilson, was obligated to pay off the lien on the mortgaged lands if he desired to retain the lands, for the mortgage constituted a lien upon these lands. When Kitchens paid $8,303.13 to Mrs. Maud Bird, the purchaser at the foreclosure sale, he was entitled to be subrogated to all of her rights, *regardless of whether it be considered that her purchase had wiped out the mortgage indebtedness or whether it be determined that the mortgage indebtedness still existed*, and Kitchens, by paying off that indebtedness, freed the lands from the lien. In either instance he is entitled to subrogation to the right of Mrs. Maud Bird to the property subject only to Wilson's one year statutory right of redemption which has long since expired.

The principles upon which this doctrine of subrogation and equitable assignment are based are recognized generally. Thus, in 37 Am. Jur. 215 (Mortgages, Sec. 829), the text writer says:

> "The holder of a mortgage superior to the one foreclosed, assuming to be redemptioner, when not made so by statute, who tenders the amount necessary to redeem, becomes, by the issuance to him of a certificate of redemption and the acceptance and retention

by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with the certificate, a 'redemptioner'. However, one who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him *within the period given by statute* to a subsequent lien holder by judgment or mortgage for such purpose." (Italics ours).

In 59 C. J. S. 1594 (Mortgages, Sec. 835), it is said:

" . . . and where one who is not entitled under the statute to redeem nevertheless does so, and has his redemption money accepted, he may become a redemptioner for all purposes, *and holds the property subject to further redemption by others.*" (Italics ours).

In Restatement of the Law of Security, at page 89, Sec. 25-B, we find:

"*b. Subrogation.* Where the pledgee discharges obligations of the pledgor *or a lien upon the pledged chattel,* under such circumstances that the pledgor would be unjustly enriched by the retention of the benefit thus conferred, the pledgee is entitled to be subrogated to the position of the obligee or lienholder (see Restatement of Restitution and Unjust Enrichment, Sec. 162)." (Italics ours).

And page 383, Sec. 141, Comment:

"*a.* Subrogation is a term describing the equitable remedy by which, where the property of one person is used to discharge a duty of another or a lien upon the property of another, under such circumstances that the other will be unjustly enriched by the retention of the benefit thus conferred, the former is placed in the position of the obligee or lienholder."

In the Restatement of the Law of Restitution, page 653, Sec. 162, it is said:

"Where property of one person is used in discharg-

ing an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder."

Mr. Pomeroy, in his universally recognized work on Equity Jurisprudence, a text which has been authoritatively cited many times by this court, said:

"The second class of parties entitled to subrogation consists of those who, while not legally bound to pay, yet might suffer loss if the obligation is not discharged, and so pay the debt in self-protection. In this class are included subsequent encumbrancers paying off a prior encumbrance, and owners of property, *or of equities* or parties in interests therein, paying off prior encumbrances. It would seem here, as in the first class of cases, that one acting in good faith in making his payment, *and under a reasonable belief that it is necessary to his protection, is entitled to subrogation even though it turns out that he had no interest to protect.*" (Volume 5, Sec. 2346). (Italics ours).

Under these authorities then we see that Kitchens, who, in good faith, undertook to redeem, although he had no right to do so, is protected. He becomes an equitable assignee of Mrs. Maud Bird. Kitchens' time for redemption expired with the sale of his rights at the execution sale, and Mrs. Maud Bird's agreement to permit him to redeem *when he had no right to do so*, was not an agreement to permit him to redeem, *but an agreement to convey*, whether she intended it as such or not, for her mistake of the legal consequences of her act in permitting his redemption cannot relieve her of the consequences thereof.

But, appellants insist that although Mrs. Maud Bird may have agreed to the redemption, J. B. Wilson did not agree to it. As heretofore pointed out, J. B. Wilson was in

no position to agree or not to agree. The right to redeem of Wilson was not in any way affected by the equitable assignment from Mrs. Maud Bird to Kitchens. He was guaranteed one year within which to redeem. If he had exercised that right within the one year he would have had the property, and inasmuch as he did not exercise that right within the one year, all of his interest in the property expired with the expiration of the redemption period.

c. *The Error In Petitioners' Reasoning.*

Petitioners, throughout this case, have either been unable or unwilling to recognize the basis for the application of the doctrine of equitable assignment. Throughout this case in each argument, petitioners have urged that Kitchens redeemed, under a statutory right of redemption and before the right of redemption had expired. For example, at page 18 of their brief, petitioners state:

> "The law seems to be that an agreement to permit a redemption *before the statutory period of redemption expires* is nothing more than a recognition of the statutory right. Such agreements may be oral, without violating the statute of frauds. *A different rule obtains where the agreement to permit redemption comes after the statutory period of redemption has expired. Such agreements are in effect agreements to reconvey, and must be in writing.*"

That the petitioners' whole line of reasoning is faulty may be seen upon referring to the last paragraph of the decision of the Supreme Court of Arkansas. (R. 188). There, Judge Robinson, of the Supreme Court of Arkansas, stated:

> "Since it developed that Kitchens had no right to redeem the transaction amounted to an equitable assignment, and the Chancellor's decree in this respect is correct."

Thus, we see that the agreement here was one to convey.

Actually, it does not matter whether there was an agreement to convey or not, or whether it was in writing or not, for there was an actual conveyance from Mrs. Maud Bird to Wade Kitchens. Regardless of what she might have thought the legal effect of her conveyance to him was, the Supreme Court of Arkansas has, with ample authority behind it, declared the conveyance to amount to an equitable assignment, and we do not believe that this court will have either the jurisdiction or the inclination to disturb that finding.

MORE ON THE QUESTION OF JURISDICTION

In general, the decision of the court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed. Patterson v. Colorado, 205 U. S. 461, 51 L. Ed. 879; Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. Ed. 382; see also in re Converse, 137 U. S. 624, 34 L. Ed. 796; Howard v. Kentucky, 200 U. S. 164, 50 L. Ed. 721; O'Neil v. Northern Colo., etc., Co. 242 U. S. 20, 61 L. Ed. 123.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the State Court does not deprive the unsuccessful party of his property without due process of law. Central Land Co. v. Laidley, 159 U. S. 103, 40 L. Ed. 91; Bonner v. Gorman, 213 U. S. 86, 53 L. Ed. 709; Delmar Jockey Club v. Missouri, 210 U. S. 324, 52 L. Ed. 1080; Tracy v. Ginzberg, 205 U. S. 170, 51 L. Ed. 755; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243; Morley v. Lake Shore, etc. R. Co., 146 U. S. 162, 36 L. Ed. 925.

In case 390 of October Term, 1949 in this court, petitioners herein against petitioner therein, page 2 of their brief, said:

"No question involving any right under the Federal

Constitution was raised in this case, by the pleadings, or under the evidence during the trial. No federal question was involved.

"No right was claimed under the Fourteenth Amendment until after the case had been reversed by the State Supreme Court. The question was raised for the first time in a petition for rehearing. This question was not raised in time."

This is the language of the petitioners here when this respondent was seeking to save the property which he felt had been wrongfully taken from him in the proceedings in the courts of Arkansas.

On page 9 of respondent's brief in said cause No. 390, petitioners herein stated:

"The other points relied upon by petitioner seem to be based on the theory that because the Supreme Court of Arkansas resolved the issues against him, the court took his property away from him without due process of law. This court does not grant certiorari to correct errors of this kind, even if such error exists."

The petitioners herein, as respondents therein, cited the following cases in support of their contentions: Great Northern Railroad Co. v. Sunburst Oil Ref. Co., 287 U. S. 358; 77 U. S. Fed. 360; American Surety Co. v. Baldwin, 287 U. S. 156; 77 U. S. Fed. 231; Godchaux Co. v. Estopinal, 251 U. S. 179, 64 U. S. Fed. 213; Missouri Ex. Rel. Missouri Ins. Co. v. Gelmer, 281 U. S. 313, 74 U. S. 870; Radio Station WOW, Inc. v. Johnson, 326 U. S. 120; 89 U. S. Fed. 2092.

At page 13 of their brief in said cause 390, petitioners here, as respondents therein, said:

"Actually, there is no Federal question involved in this case. It has been said that the due process clause does not take up the laws of the several states and make all laws pertaining to them constitutional questions, nor does it

enable the United States Supreme Court to review the decisions of the state courts upon questions of state law." See Enterprise Irrigation Dist. v. Farmer's Mut. Canal Co., Neb. 1917, 37 S. Ct. 318, 243 U. S. 157, 61 L. Ed. 644; McCaughey v. Lyall, Cal. 1912, 32 S. Ct. 602, 224 U. S. 558, 56 L. Ed. 883; Waters-Pierce Oil Co. v. Texas, Tex. 1909, 29 S. Ct. 220, 212 U. S. 86, 53 L. Ed. 417.

On page 14 respondents in said cause, now petitioners herein, stated:

"The Constitution does not guarantee that decisions of state courts shall be free from error or require that pronouncements shall be consistent." Worchester County Trust Co. v. Riley, Mass. 1937, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268.

Further, at page 14 of their said brief respondents therein, being now petitioners herein, stated:

"A state court cannot be deemed guilty of a violation of its obligation under the constitution because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. It must be accepted as a correct exposition of the law of the State, common, statutory and constitutional, and the only inquiry can be, does the State law, as applied, afford due process?" In re Converse, Mich. 1891, 11 S. Ct. 191, 137 U. S. 624, 34 L. Ed. 796; see also, Howard v. Kentucky, Ky. 1906, 26 S. Ct. 189, 200 U. S. 164, 50 L. Ed. 421; Queens Land, etc. Co. v. Kings County Trust Co., D. C. N. Y. 1918, 255 F. 222; affirmed 1920; 40 S. Ct. 395, 252 U. S. 572, 64 L. Ed. 722; Gray v. Hall, 1928, 265 P. 246, 203 Cal. 306.

Due process means, due procedure and an opportunity to be heard. Anderson National Bank v. Luckett, 321 U. S. 232, 88 L. Ed. 692, 151 ALR 824.

At the bottom of page 15 and the top of page 16 of their said brief respondents who are now petitioners said:

"Petitioner takes issue with the Supreme Court of

Arkansas because that court held that Kitchens should have taken advantage of his right to redeem within the statutory period. There are very good reasons why the time for redemption should be limited and the courts generally recognize that an execution sale may be set aside by the court issuing the execution during the redemption period, for mere irregularities, but if the judgment debtor waits until after the time for redemption has expired and after the sheriff has executed his deed to the purchaser, to attack the sale, his attack would then be a collateral attack; and in that case the sale will not be set aside for mere irregularities."

The petitioners state that the authority for this court to review this case is predicated upon Title 28, USCA Sec. 1257 (3). We submit that the language of that does not support the petitioners in their contention seeking certiorari and that it has no application to the issues posed by this proceedings. We do not see how petitioners can show this court any authority under that section to have this court review the issues involved in this litigation.

STATE STATUTES PERTAINING TO REDEMPTION AND STATE DECISIONS AND AUTHORITIES FOUND AT PAGE 16 OF THE BRIEF OF PETITIONERS.

Petitioners discuss the Statutes of Arkansas giving the right to redeem from mortgage foreclosure sales. The Statutes are correctly quoted. They have relied upon what they say is the leading authority on Arkansas Mortgages compiled by Mr. Hughes, a former Circuit Judge in Northeastern Arkansas and later a practicing lawyer in Memphis, Tennessee. They quote from his textbook.

We brought to the attention of the Supreme Court of Arkansas quotations from Judge Hughes' textbook and authorities which we thought answered the quotations relied upon by the petitioners here, they were appellants

there. The quotations we relied upon sustained our position as we viewed it. The Supreme Court of Arkansas, after thorough, long and careful consideration, found that the contention of the appellants there, petitioners here, was not tenable. So in view of the fact that our court considered the whole question during the entire time they had it under consideration, which was several weeks, and after giving it due consideration the court was of the unanimous opinion that the contention of the appellants there, petitioners here, was not well taken and they affirmed the decision of the trial court, that is, the Columbia County Chancery Court. There was no dissent. Our court had been thoroughly briefed on the question because the litigation between the respondent here and the petitioner here, in the courts of Arkansas, covered a period beginning January 13, 1938, and there can be no doubt but that the opinion of the Supreme Court of Arkansas was well considered and supported by the numerous decisions which were cited by the respective attorneys recited in their briefs and their opinions which the court by reason of its independent research considered.

In answer to Sections 506 and 507 quoted from Hughes on Arkansas Mortgages, by the petitioners, petitioners, as appellants in the Supreme Court of Arkansas, quoted from those two sections and in answer thereto respondent here, appellee there, quoted from Mr. Hughes on Arkansas Mortgages, at Section 511, page 428, in which Judge Hughes had this to say:

> "When Sale Made Under Decree.—What has been said above as to the purchaser's right of possession when the sale is made under the power applies to sales under chancery decrees. There is no redemption from sales under such decrees except under the Act of 1899 providing for redemption in case the mortgage does not waive the right. In such a case the right of redemption is substantially the same as to time and amount to be paid as where sale is made under the

power. The only difference is in the rate of interest. The purchaser at sales under decrees from which redemption may be made is entitled to possession during the period of redemption."

The rights of a purchaser at a valid sale are set out in Section 354, page 301 of Mr. Hughes' text:

> "A purchaser at a valid sale under the power may come to occupy either of two positions, depending on the exercise of the right of redemption. If no redemption is effected, he becomes absolute owner and accountable to no one. If the land is redeemed, the purchaser is treated as a mortgagee in possession and accountable as such to the extent of the price paid by him."

As we have already argued, if redemption had not been effected Mrs. Maud Bird would have become absolute owner and accountable to no one. Mr. Wilson lived several years afterward and he did not attempt to redeem. By the redemption Wade Kitchens became owner of the lands covered by the Lester mortgage. His ownership became absolute by equitable assignment as hereinbefore argued and as found by the Supreme Court of Arkansas at a time when it had jurisdiction of the parties, of the subject matter and before any attempt was made to inject a Federal question. The rights of all the parties were adjudicated in absolute harmony with the statutes and with the law of the State of Arkansas as reflected by its own decisions and the great weight of authority found in the decisions of the courts of last resort, in many of the states and so far as we know there are no decisions in the contrary. At least, the industry of distinguished counsel for the petitioners has failed to point to any controlling authority on the controlling issue in this case.

The petitioners have wholly failed to meet the issue on the vesting of title by equitable assignment. They have never submitted any satisfactory authority tending to sustain their contention on that issue. They intimated that

the Supreme Court of Arkansas made a contract between respondent and Mrs. Maud Bird but they have failed to call direct attention to any evidence sustaining such contention and have wholly failed to furnish any authority to support that contention. We desire to call attention to Vol. 6 C. J. S., page 1101, in which it is said:

> "An assignment which a court of equity will recognize and which a court of law will not, constitutes an equitable assignment; it being implied from the circumstances and because of the equities involved, and recognized solely because the assignee is a purchaser for value. No particular form is necessary to constitute an equitable assignment, and any words or transactions which show an intention on the one side to assign and an intention on the other to receive, *if there is a valuable consideration, will operate as an effective equitable assignment*, even though the instrument assigned is a specialty. Parol and written equitable assignments are of equal validity, * * * "
> (In re Macauley, (D. C. Mich.) 158 F. 322; Jamorwil Realty Corporation v. Schickler, 225 N. Y. S. 231, 222 App. Div. 45; Farmers' Exchange v. Walter M. Lowney Co., 115 A. 507, 95 Vt. 445; Bleitz v. Bryant Lumber Co., 194 P. 550, 113 Wash. 455; Calif. Packing Corp. v. Emirzian, 187 P. 77, 45 Cal. App. 236; State Central Sav. Bank v.Hemmy, (C. C. A. Iowa) 77 F. (2d) 458; Blount v. Farmers' Bank of Greenville, N. C. (D. C. N. C.) 297 F. 277, affirmed Farmers' Bank of Greenville v. Blount, C. C. A.) 8 F. (2d) 443; General Excavator Co. v. Judkins, 190 N. E. 389, 128 Ohio St. 160; C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson, (Civ. App.) 196 S. W. 262; Theatre Realty Co. v. Aronberg-Fried Co., (C. C. A. Mo.) 85 F. (2d) 383; In re Dier, (C. C. A. Pa.) 296 F. 816; Ehrich v. Eisenlohr, 44 S. Ct. 459, 265 U. S. 584, 68 L. Ed. 1191; Allen v. Hamman Lumber Co., 34 P. (2d) 397, 44 Ariz. 145; Van Orden v. Golden West Credit & Adjustment Co., 9 P. (2d) 572, 122 Cal. App. 132; Los Angeles City School Dist. of Los Angeles County v. Tucker, 278 P. 507, 99 Cal. App. 390; McClure v.

Century Estates, 120 So. 4, 96 Fla. 568; Hall v. University Realty Co., 121 So. 808, 97 Fla. 639; Power Grocery Co. v. Hinton, 218 S. W. 1013, 187 Ky. 171; Glassbrenner v. Morgan, (App.) 296 S. W. 201; Hofferberth v. Duckett, 162 N. Y. S. 167, 175 App. Div. 480; Fleck v. Helps, 42 Pa. Co. 312; Ross v. Wells, etc., Co., 5 Pa. Co. 430; Patterson v. Citizens' Nat. Bank of Lubbock, (Civ. App.) 236 S. W. 130; Stewart v. Heywood, 220 P. 717, 62 Utah 466; Rinehart & Dennis Co. v. McArthur, 96 S. E. 829, 123 Va. 556; Paul v. City of Vancouver, 154 P. 453, 89 Wash. 331; Citizens' State Bank of Sheboygan v. City of Sheboygan, 224 N. W. 720, 198 Wis. 416; 5 C. J. p. 910 note 23; Farmers' Exchange v. Walter M. Lowney Co., 115 A. 507, 95 Vt. 445; Conygham v. Smith, 16 Iowa 471; Allen v. Pancoast, 20 N. J. Law 68; Kamena v. Huelbig, 23 N. J. Eq. 78; Bridgham v. Tileston 5 Allen (Mass.) 371).

While Mr. Kitchens was not a judgment creditor nor a junior lienor, he acted in good faith to protect his claim in the suit to set aside the execution sale and as such was not a volunteer and appellants at various times now admit that he was justified in taking the action he did. The only trouble is they now seek to profit. Mrs. Maud Bird, who accepted the $8,303.13 deposited in the registry of the court on September 10, 1938, in response to the offer contained in her letter of July 27, 1938, waited until December 23, 1938, to take down the money. Under the decision she is estopped to question the transaction. The heirs of J. B. Wilson have no right to question the transaction.

It must be remembered that no constitutional question was raised in any of the pleadings filed in this long litigation and the first intimation of the assertion of any constitutional rights under the provisions of Amendment Fourteen to the Constitution of the United States came when petitioners here, appellants there, filed their Petition for Rehearing and merely stated that by its decision the Supreme Court had deprived them of their property without due process of law.

Lest we forget, it must be remembered that learned counsel for the petitioners not so long ago in the course of this proceeding indicated that if Mrs. Maud Bird accepted the money after the time for redemption expired that an equitable assignment of her rights necessarily followed (R. 191—Subdivision VIII of Petition for Rehearing; R. 200 Wade Kitchens' Response to Subdivision VIII of Petition for Rehearing in the Supreme Court of Arkansas). Following his reasoning we are at a loss to understand how they can further resist the claims of the respondent herein.

While Mrs. Maud Bird consented in writing for the redemption to be made before the one year expired, the petitioners here (appellants in the Supreme Court of Arkansas) overlooked the fact that she did not take the money down until December 23, 1938, and the admission contained in paragraph VIII of their Petition for Rehearing settles the lawsuit according to their own view of the law as stated in their Petition for Rehearing. The redemption was not completed until she accepted the money. She did not have to accept it. She waited 104 days before she took the money down. So learned counsel's statement: "The court's decision that there was an equitable assignment from Mrs. Bird to Mr. Kitchens would be correct, if the redemption had occurred *with the consent of Mrs. Bird after the equity of redemption had expired.*" It must necessarily follow that the contention of petitioners must be denied on account of the language used and as a result of their own statement.

In Paragraph VII of Petition for Rehearing in the Supreme Court of Arkansas the petitioners here stated there that as between Mrs. Maud Bird and Mr. Kitchens there was an equitable assignment. (R. 191).

In paragraph X of Petition for Rehearing (R. 192) petitioners quote what the Supreme Court of Arkansas said as to Wilson's right to redeem from Kitchens at any time before the one year statutory period of redemption

expired and admit the truth of that finding but they say in substance that Wilson at the time did not know that the law would be declared to be. It must be conceded that petitioners are not entitled to relief because of their failure to know what the law was. The respondent has not been able to recoup for any losses that he sustained for his failure to know the law. Any statement made by the petitioners in their Petition for Rehearing must be treated as a part of their argument and a part of their contention and they are bound by the effect thereof.

CONCLUSION

In conclusion, respondent respectfully submits that the Petition for Writ of Certiorari should be denied, first, because no Federal question was raised in and considered by the State Court; second, because there was no Federal question involved in the decision of the State Courts; and third, because on the merits of the case, the State Courts did equity to all parties.

Respectfully submitted,

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